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JAMES H. McKENNEY,
Clerk

Supreme Court of the United States.

JOSEPH RALPH BURTON,
Plaintiff in Error,
vs.
THE UNITED STATES OF AMERICA,
Defendant in Error.

NUMBER 343.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

BRIEF FOR THE PLAINTIFF IN ERROR.

JOHN F. DILLON,
HARRY HUBBARD,
JOHN M. DILLON,
W. H. ROSSINGTON,
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For Plaintiff in Error.

C. G. Burgoyne, Walker and Centre Streets, New York.

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Supreme Court of the United States.

JOSEPH RALPH BURTON, Plaintiff in Error, vs. THE UNITED STATES OF AMERICA, Defendant in Error.	Number 343.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

BRIEF FOR THE PLAINTIFF IN ERROR.

Statement of the Case.

The indictment is founded upon Section 1782 of the Revised Statutes of the United States, which is as follows:

"SEC. 1782. No Senator, Representative, or Delegate, after his election and during his continuance in office and no head of a Department, or other officer or clerk in the employ of the Government, shall receive or agree to receive any compensation whatever, directly or indirectly, for any services rendered, or to be rendered, to any person, either by himself or another, in relation to any proceeding, contract, claim, controversy, charge, accusation, arrest, or other matter or thing in which the United States is a party or directly or indirectly interested, before any Department, court martial, Bureau, officer, or any civil, military or naval commission whatever. Every person offending against

this section shall be deemed guilty of a misdemeanor, and shall be imprisoned not more than two years, and fined not more than ten thousand dollars, and shall, moreover, by conviction therefor, be rendered forever thereafter incapable of holding any office of honor, trust or profit under the government of the United States."

The Indictment and Proceeding Thereon.

The indictment is in nine counts. The first count charges that

(a) Burton is United States Senator from Kansas, whose term does not expire until March 4, 1907.

(b) On March 26th, 1903, at St. Louis, Missouri, Burton received from Rialto Grain and Securities Company $500 in money as compensation for services rendered between 22d day of November, 1902, and March 26th, 1903, to the company before the Post-office Department.

(c) In a matter then pending before said department in which the United States was *directly* interested; that is to say:

(d) Whether said company had violated Section 5480 R. S., U. S., in that it had devised a scheme to defraud, which was to be effected by the company in opening correspondence by means of the post-office of the United States, with divers persons resident in the United States, and whether it had in and for executing the scheme deposited any letter or packet in any post-office of the United States.

(e) To the end and for the purpose of enabling Postmaster General to find and determine from evidence satisfactory to him whether he should order St. Louis Postmaster not to deliver letters to Rialto Company, but return them marked "Fraudulent," as authorized by Sections 3929 and 4041, Rev. St., as amended March 2, 1895.

(f) Services of Burton consisted in part of visits by Burton to Postmaster General, Chief Post-office In-

spector and other officers of Post-office Department, and of representations and statements to these officials made with a view and for the purpose of inducing the Postmaster General, the Chief Post-office Inspector and said other officers to decide the question so as aforesaid pending before the Post-office Department in a manner favorable to the company.

2ND COUNT : Same as 1st, except U. S. *indirectly* interested.

3RD COUNT : Same as 1st, except money received from Mahaney, employee of Rialto Company. [On this count the jury returned verdict " not guilty." Rec., p. 24.]

4TH COUNT : Same as 1st, except money received from Dennis. [*Nolle prosequi* entered on this count [Rec. p. 233.]

5TH COUNT : Same as 3d, except Dennis put in place of Rialto Company. [*Nolle prosequi* entered on this count Rec. p. 233.]

6TH COUNT : Same as first, except that it charges that on November 22, 1902, at St. Louis, Mo., the defendant unlawfully accepted and received a check drawn upon the Commonwealth Trust Company of St. Louis, for the payment of money payable to defendant's order, and by the defendant duly endorsed and then and there paid by said Trust Company, in lawful money to the said defendant as compensation for services rendered before the P. O. Department on November 22, 1902, and between that date and March 26, 1903 ; in all other respects this count in the indictment is the same as the counts 1 and 2.

7TH COUNT : Same as 6th, except check is dated December 15th, 1902.

8TH COUNT : Same as 6th, except check is dated January 22d, 1903.

9TH COUNT: Same as 6th, except check is dated February 16th, 1903, and drawn by Mahaney, V. P., of the Rialto Company.

THE GRAVAMEN of each of the offences charged in the indictment is that the Post Office Department had before it pending for decision the question whether a "fraud order" should be issued against the Rialto Company, and that with knowledge of such pending inquiry Senator Burton for compensation rendered services in the matter thus pending with a view and for the purpose of inducing the officials of the Post Office Department to decide such pending matter or case against the issue of such fraud order. Such is the only offense charged in the indictment.

It may here be noted that the 6th, 7th, 8th and 9th counts untruly allege that the said four checks were severally *accepted and received* by the defendant *at the City of St. Louis* and that the money was then and there *paid on the said checks to the defendant in St. Louis.*

Not one of these checks was received by the defendant in St. Louis, but all of them were received in Washington, and the Government afterwards so stipulated (Rec., p. 111), and this is an undisputed fact in the case. It is also undisputed that the defendant transferred all these checks to the Riggs National Bank, Washington, and received immediate credit therefor. It is also an undisputed fact that the money on all of said checks was paid in St. Louis, not to the defendant but to the indorsee or transferee of the checks, the defendant not being present in St. Louis or the State of Missouri when the money was paid on said checks.

SECTION 5480 Revised Statutes forbidding use of the mails to effect any scheme or artifice to defraud, and Sections 3929 and 4041 Revised Statutes, which confer authority upon the Postmaster General to issue what

are called "Fraud Orders" in such cases; also Section 731 Revised Statutes as to venue, and certain relevant provisions of the Constitution of the United States are reprinted in the Appendix to this brief.

THE INDICTMENT was found in the District Court of the United States for the Eastern District of Missouri January 23, 1904 (Rec., pp. 3–19).

The defendant, being in attendance as a Senator for Kansas upon the Senate which was in session at the time, on learning that the indictment was found, and before process was served upon him, appeared on January 27, 1904, in the said court at St. Louis and pleaded "not guilty" (Rec., 19). This plea was withdrawn in order to file the demurrer below mentioned (Rec., p. 20).

The Court overruled a demurrer to the indictment February 13, 1904 (Rec., p. 21. See opinion of the Court on the demurrer, pp. 279-285).

On March 22, 1904, the United States *nolled* the fourth and fifth counts of the indictment (Rec., p. 22).

The defendant again pleading "not guilty," the trial to a jury began, and extended over March 23d, 24th, 25th, until Saturday, March 26th, when the jury retired to consider of their verdict (Record, pp. 20–24).

The jury were in deliberation until Monday, March 28th, when they received a further charge from the Court (Rec., pp. 246–253), and on the same day the jury rendered the following VERDICT (Rec., p. 24):

"We, the jury in the above-entitled cause, find the defendant guilty as charged in Counts One (1), Two (2), Six (6), Seven (7), Eight (8) and Nine (9) of the indictment, and not guilty as charged in Count Three (3). C. W. WALL, Foreman" (Record, p. 24).

Counts one and two are but slightly variant statements of the same alleged offense, yet the jury was permitted to find the defendant guilty on both these counts.

Motion for new trial and motion in arrest of judgment were overruled (Rec., p. 25). The opinion of the Court on the motion for a new trial (see Rec., p. 286).

On April 6, 1904, the Court pronounced the following SENTENCE AND JUDGMENT:

"This day comes the United States by District Attorney and the said defendant being present in court in compliance with the recognizance heretofore entered into by him in this cause and also appearing by Chester H. Krum, Esquire, his attorney, the *Motion for a New Trial* and the *Motion in arrest of Judgment* heretofore filed by the defendant in this cause having been taken up the same are argued by counsel and submitted to the court and the court having considered said motion and being fully advised of and concerning the same It Is Ordered that the said motions be and the same are hereby overruled.

"And thereupon the said District Attorney asks the judgment and sentence of the Court upon the Verdict of guilty heretofore returned by the jury to the charges as contained in the first, second, sixth, seventh, eighth and ninth counts of the Indictment herein and the said defendant having nothing further to say after demand made of him why such judgment and sentence should not be rendered:

"It is therefore now considered by the Court, and as the judgment and sentence of the Court upon the said verdict of guilty so returned by the jury in this cause, that he, the said defendant, Joseph Ralph Burton, make his fine to the United States of America by the payment of the sum of ($2500.00) Twenty-five hundred dollars and also the costs of the prosecution to be taxed and that he, the said defendant be confined and imprisoned in the Iron County Jail at Ironton, State of Missouri, for and during the term of (6) Six Months.

"And the Marshal of the United States, in and for the said Eastern District of Missouri, is hereby directed to deliver the said prisoner, together with a duly certified copy of this judgment and sentence to the Jailer of said Iron County Jail" (Record, pp. 25, 26).

(As to the important questions arising on this sentence and judgment, see POINT V., *infra*, pp. 182–196.)

A BILL OF EXCEPTIONS containing all of the evidence (p. 229) and the rulings of the Court in the progress of

the trial, the charge *and additional charge* of the Court, the defendant's instructions given and refused and the various exceptions, was allowed and is found in the record.

Record, pp. 26 to 253.

Jurisdiction of this Court on this Writ of Error.

From the foregoing sentence and judgment the defendant has taken a writ of error direct to this Court from the District Court of the United States for the Eastern District of Missouri under Section 5 of the Judiciary Act of 1891 (26 Stats., 826), which, *inter alia*, provides for such writ of error " in any case that involves the construction or application of the Constitution of the United States," and " in any case in which the constitutionality of any law of the United States * * * is drawn in question."

(1) This case involves the construction and application of Article III., Section 2, of the Constitution and the Sixth Amendment thereto, whereby the defendant is entitled to be tried by a jury of the state or district in which the crime alleged against him in the indictment was committed, and to be informed of the nature and cause of the accusation.

(2) The case involves the construction and application of said Sixth Amendment, for that the defendant was denied the right which said Amendment to the Constitution gives him, to have the question of his guilt of *the particular charge laid in the indictment* tried and decided by the jury.

(3) This case also involves the construction and application of the following provision of Article I., Section 6 :

" That they [Senators and Representatives] shall in all cases, except treason, felony and breach of the

peace, be privileged from arrest during their attendance at the session of their respective houses, and in going to and returning from the same."

(4) This case also involves the constitutionality of Section 731 of the Revised Statutes of the United States as it was construed and applied by the District Court in the present case.

The above-mentioned provisions of the Constitution involved in this case and also said Section 731 of the Revised Statutes are reprinted for the convenience of the Court in the Appendix to this brief.

The several questions arising as to the construction and application of the Constitution and as to the constitutionality of said Section 731 we do not discuss *in limine* at this place, but these questions are discussed under appropriate headings in this brief.

Where a case thus involves the construction or application of the Constitution of the United States or the constitutionality of an Act of Congress, it is well settled by this Court that the case may be brought here on a direct writ of error to the District Court, and that on such writ of error the entire case is open for the consideration of this Court.

STATEMENT OF FACTS AND OBSERVATIONS THEREON.

At the risk of redundancy concerning matters considered in detail in subsequent parts of the brief, we believe it to be important, as an aid to the Court, and by way of immediate understanding of this case, to narrate the facts in chronological order which were adduced at the trial, and which appear upon the record.

Prior to June, 1902, there existed in St. Louis what was known as the *Brooks Brokerage and Commission Company*, a concern engaged in the purchase and sale of grain and stocks upon commission. Major Hugh C. Dennis was at that time the general agent for the three States of Missouri, Arkansas and Kansas of the

Hartford Life Insurance Company, of Hartford, Conn., and had been successfully prosecuting that business for some time.

In June, 1902, Major Dennis purchased the business of this Brooks Brokerage Company from one Charles H. Brooks, who was its organizer, and presumptively, its owner at the time of such purchase.

Major Dennis continued his relationship to his business of life insurance, and after his purchase left the management of the business of the Brooks Brokerage Company to one E. C. Walden, who had been secretary of the company under Mr. Brooks' management, and who, under this arrangement, had charge of all the details of the brokerage business.

About the 27th of July, 1902, Mr. Brooks, who was then in California, wired Major Dennis to the effect that he would repurchase a half-interest in the business, back the business with a credit of $50,000 and add new features to it. This proposition was declined by Major Dennis; whereupon Brooks, who was then in California, started to St. Louis, bringing a lawyer with him, and began what one of the witnesses (Harlan) styled "a fake collection agency," the real object of which was claimed and asserted to be to organize a fight against Dennis and the brokerage business, with a view of compelling him to take Brooks back into the Company or, in the alternative, "to hold him up for a large amount of money."

This action of Brooks was followed by a number of lawsuits, and thereupon Dennis, to obviate the obstacles created by these lawsuits, wound up the business of the Brooks' Brokerage Company and organized a new corporation called the *Rialto Grain & Securities Company*, on the 2d of September, 1902. The stock of this company was owned by Major Dennis. It was regularly organized, under the advice and counsel of Judge Chester H. Krum and Thomas B. Harlan, who were from the date of its organization continuously, attorneys for the company at all times covered by the facts hereinafter narrated.

The purpose of this company was to deal in grain, provisions and securities. See, with reference to foregoing statements, letter of Harlan to Burton, November 18, 1902 (Record, pages 91, 92 and 93), and also the evidence of Harlan (Record, pages 170, 171 and 172), and the charter of the Rialto Grain Company (Record, pages 28, 29 and 30). To distinguish this company from the *Brooks Brokerage Company* it will hereafter in this statement be called for short the *Rialto Company.*

As a result of these controversies, and the effort of Brooks to destroy Dennis, or to control him, an investigation of the Brooks Brokerage Company by the postal authorities was brought about in November, 1902.

Following this very active and bitter fight made against Dennis by Brooks, Dennis was apprehensive that he might be indicted as the then responsible owner of the Brooks Brokerage Company, and began to prepare himself for such a result. It was also feared that such indictment might materially injure the business of the Rialto Company, and particularly so unless the matter growing out of the Brooks Brokerage transactions (with which as it was ultimately shown, by reason of his acquittal, Dennis had nothing to do) should be speedily heard and determined. Such was the condition of affairs on the 17th day of November, 1902. See, in support of this statement, letter of Harlan to Burton (Record, page 92), Harlan's evidence (Record, page 172), Kastor's evidence (Record, page 86).

How Burton Came to be Employed.

H. W. Kastor & Sons is a St. Louis firm extensively engaged in the advertising business, making large contracts for advertisements of all forms of business in newspapers and periodicals. The members of this firm of Kastor & Sons were all friends of Senator Burton, and especially its managing head, Mr. Ernest

Kastor, was and had for a long time been the personal and business friend of Senator Burton.

This firm of Kastor & Sons had also had large advertising contracts from Major Dennis, to advertise the business of the Rialto Company throughout the country. Without Burton's knowledge or procurement Kastor, as a friendly act, advised Major Dennis to employ Senator Burton, and Dennis, acting upon this advice, directed one of his local counsel, Mr. Harlan, to try to engage Senator Burton not only as Dennis' personal counsel in this apprehended indictment in the Federal Courts, but also as the general counsel of the Rialto Company. See testimony of Kastor (Record, pp. 82, 87 and 88).

At that time, Senator Burton was a total stranger to Major Dennis and knew nothing whatever about the Brooks Brokerage Company or the Rialto Company. Neither had he ever before met Mr. Harlan. See Kastor's evidence (Record, pp. 72 and 86), and Harlan's testimony (Record, p. 170). Also the letter of Harlan to Burton (Record, pp. 91 and 92).

The Contract of the Rialto Company with the Defendant.

On the 17th day of November, 1902, Burton was introduced to Major Dennis and Mr. Harlan, while sitting in a carriage in front of the Rialto building, in St. Louis, on his way to the station to take the train for Chicago. There was no talk there, except by way of formal introduction, upon the subject of Burton's employment. Mr. Harlan got into the carriage and accompanied Senator Burton, and the two Kastors, to the station, and Harlan and Burton and Ernest Kastor proceeded on the train to Chicago. It was obvious that no arrangement for the meeting had been made, and in order to discuss the subject of Burton's employment, it was necessary for Harlan to accompany Burton to Chicago. Their conference resulted in an

agreement, subject, however, to the approval of Dennis, but all the terms of this agreement were discussed in detail and settled in this conversation between Harlan and Burton. This agreement was submitted to Dennis on November 18th, and by him ratified (see Letter, page 91 of the Record). Its terms are fully shown in the record and a perfect agreement upon those terms exists in the testimony of Kastor, Harlan and Burton, and there is no testimony contradicting or tending to contradict it.

It was in substance agreed that Senator Burton should act as general counsel for the Rialto Company. Particularly he was to assist in the defense of any criminal prosecution that might be instituted against Major Dennis, growing out of the Brooks brokerage business. In respect to this employment, Dennis and the Rialto Company were by the parties held and regarded as one, Dennis being the substantial owner of the stock of the Rialto Company.

There was developed in this conversation to Senator Burton a plan wherein his services might be particularly useful to the company. At the time of these transactions there were a large number of railroad and other enterprises on foot in various parts of the west, wherein corporate bonds were to be issued and underwritten at a particular sum, by various trust companies, which meant a loan or advancement of money upon a particular valuation of these securities. The Rialto Company had large and valuable lists of names of investors in various parts of the United States, and had unusual facilities for corresponding with these investors, in the way of an office force and the various machinery necessary for such business. It was the purpose of the company to undertake the sale of these securities, upon commission, or for what could be made over a particular sum, and Harlan was enthusiastic with reference to this proposed branch of the business of the new company; and it was by reason of the Senator's relationship and acquaintance that this connection was peculiarly valued with reference to the de-

velopment of the securities feature of this business. This was fully gone over and discussed and was a very important topic of consideration between Harlan and Burton at the time the contract was made. Burton was expected to aid the Rialto Company with the trust companies and other companies in the east in the placing of these securities.

The compensation to Burton was to be $500 a month, payable in advance, and was to continue for a period of not less than five months, the first month to commence on the 18th of November, 1902. It was mutually agreed that the subsequent monthly periods should be changed to begin on the 15th of each month.

This contract was made in this form for the following reason: Burton was unwilling to remain if his services were not desired by the company, and the company might be free to terminate such services at any time; but it was suggested that, inasmuch as the peculiar reason for his employment was the impending criminal proceedings, which might be brought to an end within a very short period, and were in fact ended before the term of his employment had ceased, that he should be paid what would be a reasonable retainer and fee for services in so important a matter, and, therefore, it was stipulated that if he accepted $500 a month as compensation for his services that that compensation should continue for five months at least.

The Contract in Terms Excluded Any Prohibited Services in the Departments.

The only witnesses as to the contract were Harlan, Kastor and Burton. Kastor was called by the Government. Harlan and Burton testified for the defense. For the convenient use of the Court, we herewith append that part of the testimony of these three witnesses which relates to the exclusion from the contract of services in the Departments.

KASTOR, who was called by the Government (p. 78), testified :

" Q. Have you stated, as fully as you can, all that occurred between here and Chicago in reference to this employment, and what occurred? A. I recollect that Senator Burton made a statement regarding that he could not act before the Department.

" Q. Now, have you any definite recollection as to what Senator Burton said in regard to matters before any of the Departments or matters before the Post Office Department? Let us have your best recollection you can afford us. A. I recollect there was a statement made, but I do not know just exactly the language of it. I was not very deeply interested in it—that the Senator stated something, that he could not act in a case before the Department, or words to that effect. I do not recollect exactly.

" Q. Are you able to indicate to the jury how that happened to be mentioned by the Senator? Can you indicate in what connection that indication was given by him? A. It was in the connection that he was to be general counsel. As near as I can recollect at that time that he could act as general counsel. Except—

" Q. That is, he was not to appear in the matters in the Departments? He indicated that, didn't he? A. Yes, sir.

" Q. He was willing to accept employment as general counsel of the company? A. Yes, sir.

" Q. With that limitation? A. Yes, sir.

" Q. That his employment should exclude the idea of his appearing before the Departments? A. Yes, sir.

" Q. That is substantially it? A. Substantially, yes, sir."

See Kastor's evidence, pages 82, 85 and 86.

HARLAN testified (pp. 172, 173, 183) :

" Senator Burton made this statement :

He said, "Now, you must remember I am a United States Senator," and with a degree of severity he said, " I am not going to do anything inconsistent with my duty as a United States Senator.

" I assured him I did not want him, under any circumstances, to do anything inconsistent with his position as United States Senator, and I was just as positive in my statement as he was in his declaration, as far as that matter was concerned.

"Q. What I want to get at is, was there any employment of him proposed to, or accepted by him in the Department, or any of the Departments? A. No, sir. The truth of the matter is, as I made it plain to him, I did not care anything about the Post Office Department, as far as what they might or might not do.

"Q. You mean by that you were not aware of the necessity of the employment of anybody in reference to the Post Office Department. A. There absolutely was no necessity.

"Q. Mr. Harlan, did you ever proceed at any time, as between Senator Burton and the Rialto Grain & Commission Company, that he was obliged or could be required, after his contract, to appear for the company in any matter before the Post Office Department, or any other Department? A. No, sir.

"Q. What I want to get at is, whether you went to the Senator or sent to him on any occasion, on the hypothesis that there was something he was required to do, and accordingly you communicated the matter to him to do or perform? A. It was more on account of my acquaintance with him.

"Q. You say you made these requests more on account of your acquaintance with the Senator than anything else. Were you acquainted with Senator Cockrell? A. No, sir."

See Harlan's testimony, pages 173, 174, 183, 201 and 202.

BURTON testified (pp. 215, 216):

"Now, Mr. Harlan, let me understand you. I am a Senator. This company is using the mails extensively. Is it contemplated in any way that I am expected to use any influence in the Departments, directly or indirectly? His answer was quite emphatic, he said: 'No, Senator, we do not want any influence in the Department. This company has been organized under the direction of myself and Judge KRUM, it is violating no law, it does not intend to violate any law, and we do not want any influence in the Department at all.' That is as nearly as I can recall the language."

See Burton's testimony, pages 215 and 216. And see Kastor's testimony, pages 80, 81, 82, 83, 84, 85, 86, 87, also testimony of Harlan, pages 170 to 202 inclusive.

We have in POINT II. of this brief *(post,* pp. 52–119) carefully extracted from the record every word of the testimony of each and every witness bearing upon, relating or showing what was done by Senator Burton under this employment. It is, therefore, unnecessary at this place to state in detail these facts, but it is proper, before entering upon the argument of this case, to advise the Court of the substance of such proof.

It was shown, and will appear, that Senator Burton was asked to inquire whether it was the purpose of the Department to prosecute Major Dennis in the Federal Courts at St. Louis, by reason of his relation to the Brooks Brokerage Company. This led to Burton's first visit to the Department. Incident to that visit, which was to the office of Chief Post Office Inspector W. E. Cochran, Burton informed Cochran that he was employed as the General Counsel of the Rialto Company, and asked if there were any complaints in the Department against that Company, and was advised by Cochran that two letters had been written, one by Hout and one by Evans, which will hereafter be known in this discussion as the Hout and Evans complaints. The simple fact of these letters was conveyed by Cochran to Burton, with the information that they had been referred to the inspector in charge at St. Louis on the 7th of that month (November, 1902). Thereupon the fact so obtained by Burton was conveyed by Burton to Harlan by letter (November 20), to which Harlan responded (November 22), and in terms informed Burton that these complaints had been by the inspector in charge in St. Louis investigated and found to be without any merit, or, as it was expressed, that there was nothing in them, and that a report to that effect had been made. Harlan did not inform Burton when he was employed about the Hout and Evans complaints (Rec., p. 189), and Burton did not know of them (Rec., p. 220).

At this point we desire to direct the Court's attention to the fact, which is the most pregnant one in this inquiry—namely, that **these two complaints of**

Hout and Evans were the only complaints in the department relating to the Rialto Company of which Burton had at any time during his employment any knowledge, or concerning which the Government sought to prove him as having knowledge or notice.

In brief, it affirmatively appears that no complaints of any sort or character in the Post-office Department were ever known to Burton except the Hout and Evans complaints, and at the very beginning of his employment Burton received positive assurance that there was nothing in those complaints, and that they had been examined and reported against.

Another fact of prime importance, and one that is apparent from one end of this record to the other, is that in all the acts and written words, and words spoken by Senator Burton in and about his employment, or any relationship to the matters of the Rialto Company, he proceeded upon the firm conviction, at all times, that there were no complaints pending in the department against the Rialto Company, because, prior to his employment, the Hout and Evans matters (of which, only, he had knowledge) had been investigated, and found and reported to be without merit.

Another fact that tends to elucidate this inquiry and to establish the position that Burton performed no services in the Post-office Department about the matter charged in the indictment, is the fact that at the time he received his first month's salary, sent in a letter from Harlan, which salary was due and payable before that time, Burton had received in that letter the assurance that the Hout and Evans complaints had been investigated and that it was found that there was nothing in them.

Inasmuch as we have reprinted in this brief under POINT II., all of the evidence in the record upon this question of services, it is unnecessary at this place to go into detail as to the subsequent visits of Senator Burton to the department, in which he had conversation with Cochran, the Fourth Assistant Postmaster

General, or to the Postmaster General, upon matters relating to Dennis or to the Rialto Company, but it is sufficient to say, as characterizing every visit, that it had nothing whatever to do with "a fraud order," or the prevention of a "fraud order"; and in no sense was any testimony as to any such conversations relevant or pertinent to the issue and the sole issue made by the indictment, to wit, that his acts or services were to prevent the issue of such order. On the contrary, all of Burton's errands and visits to the department were on matters totally disconnected from this subject matter, and were absolutely legitimate and proper.

The record fully discloses, and it will be hereafter shown in this brief, in the correspondence and conversations that Senator Burton had with Harlan, that Burton was assured that both the Rialto Company and Dennis were absolutely free from any wrongdoing or evil purpose of any sort or nature, and that they were being unjustly dealt with and accused without ground or foundation by Brooks, of the Brooks Brokerage Company, who sought the Courts as a means to punish Dennis. Dennis' subsequent acquittal, "by direction of the Court," under an indictment later found in St. Louis, a fact which this record discloses (p. 210), would indicate that Harlan's statements and assurances to Burton in this respect were true; and Burton's entire conduct, as disclosed by this record, evinces his belief that they were true (Rec., pp. 216, 217).

It appears, therefore, that Burton's employment came about in a natural way, that it had about it no fact or appearance that rendered it questionable, or would inspire a suspicion in Burton that he was lending his professional services to one unworthy. He was associated with Krum and Harlan, well-known and reputable St. Louis attorneys. It further appears that he did render services, and substantial services, in the matter for which he deemed himself to be specially employed, namely, in the criminal proceedings fomented by Brooks against Dennis, and as general

counsel for the company (see *post*, pp. 114 *et seq.*, as to the nature and extent of such services).

It is unthinkable that if Burton had in mind the rendition of questionable services to a client of questionable character he should have permitted, as he really did, the use of his name upon the stationery of the company as its general counsel. His name thus appears with Judge Krum's and Mr. Harlan's. Harlan visited Washington and had long and elaborate counsel with Burton upon the Dennis case. Subsequently the briefs were brought by Dennis himself to Washington to Burton, who went over them, and afterwards Burton made a trip to St. Louis to still further give counsel, and with a view to preparing for the trial of Dennis. He was counseled with, as appears by this record, in other matters dissociated from the prosecution of the Dennis case and rendered services in that respect.

Each month's pay of Senator Burton was paid in a regular way by check, at the time or shortly after it was due, with the exception of one payment in cash on March 26, 1903. These checks were received by Burton in Washington and by him taken to his bank—the Riggs National Bank in Washington—with his endorsement thereon. The Riggs National Bank received them and placed them at once to Burton's credit. It is obvious that the understanding of both the bank and of Burton was that Burton parted with title to the check, and at the moment credit was given to him ; he himself could withdraw the money at any moment, but could not recall or reclaim the check, which was no longer his property. The checks were all paid upon presentation at St. Louis to the transferees of the bank. (As to the CHECKS and the important questions arising thereon, see POINT III., *post*, pages 120–173.)

Assignment of Errors.

The Assignment of Errors is printed in full in the Record, pages 253–275, and, therefore, is not here repeated at length.

ARGUMENT.

I.

RE "INTEREST OF THE U. S. UNDER SEC. 1782, R. S., AND UNDER THE PROOFS IN THIS CASE.

The United States was not "directly or indirectly interested" in the question whether a fraud order should issue against the Rialto Grain and Securities Company; and, therefore, the Court should have sustained the Demurrer to the Indictment, or should have granted the Motion in Arrest of Judgment, or should have directed a Verdict for Defendant, and should not have instructed that the United States was "interested" as alleged in the indictment (Rec., p. 233).

The language of the statute (Revised Statutes, Sec. 1782) is as follows:

"No Senator, Representative or Delegate, after his election, and during his continuance in office, and no head of a Department, or other officer or clerk in the employ of the Government, shall receive or agree to receive any compensation whatever, directly or indirectly, for any services rendered, or to be rendered, to any person, either by himself or another, in relation to any proceeding, contract, claim, controversy, charge, accusation, arrest or other matter or thing in which the United States is a party, or directly or indirectly interested, before any Department, court-martial, Bureau, officer, or any civil, military or naval commission whatever. Every person offending against this section shall be deemed guilty of a misdemeanor, and shall be imprisoned not more than two years, and fined not more than ten thousand dollars, and shall, moreover, by conviction therefor, be rendered forever thereafter incapable of holding any office of honor, trust, or profit under the Government of the United States."

This question whether the United States was or was not interested, is raised not only by the demurrer to the indictment (Record, page 20), which was overruled by the trial Court, but also by the motion of defendant to direct a verdict, and also by instructions to the jury (Record, page 233) that the United States was "interested," within the meaning of Section 1782 of the Statutes, in the determination of the question, if there was a question pending before the Post-office Department, as to the issuance of a fraud order against the Rialto Grain and Securities Company, and by the specific exceptions which the defendant took (Record, page 245) to that part of the charge of the Court.

Legislative History of Section 1782 of Revised Statutes, Showing its Occasion and Purpose.

The legislative history of the enactment of Section 1782 of the Revised Statutes supports the view here stated, namely, that Congress when it enacted the statute which is now Section 1782 of the Revised Statutes intended to include only those matters or things in which the United States is a party, or in which the United States as a government has a money or property interest; in the language of Chief-Justice SHAW, below quoted (this brief, page 37), "an interest whereby the United States will gain or lose something by the result of the proceedings."

The occasion for the enactment of this statute was the Civil War and, using the words of the statute, the "proceedings, contracts, claims, controversies, charges, accusations and arrests before Departments, court-martials, bureaus, officers and civil, military and naval commissions," which grew out of the Civil War and which were connected with it, and in which the United States was a party or had a pecuniary or property interest. In most of these cases mentioned in the statute, the United States is a direct party, as in the case of arrest, accusation, charge, contract, claim, proceedings and controversies before court martials, mili-

tary and naval commissions, etc. In order to bring a matter or thing within Section 1782, the United States must either be a party, or it must have a pecuniary or property interest in the matter or thing, or there must be some real interest of the United States as a government by which it will gain or lose something as a result of the decision of the matter or thing.

SENATE PROCEEDINGS.

The bill for the act was introduced into the Senate December 23, 1863, by Mr. WADE (S., No. 28), "Congressional Globe," Part I., First Session 38th Congress, 1863–64, page 93, column 1, where the substance of the bill is stated, and the bill was referred to the Committee on Judiciary and printed.

February 3, 1864 ("Congressional Globe," page 460), Mr. TRUMBULL, from the Committee on Judiciary, to whom the bill was referred, reported it with amendments.

February 10, 1864 ("Congressional Globe," page 555), the bill was taken up for consideration. The Committee on Judiciary reported in favor of striking out the following words:

"No member of the Senate or of the House of Representatives of the United States shall, during his continuance in office, hereafter appear or act as counsel, attorney or agent in any cause or proceeding, civil or criminal, in any court, civil, criminal, military or naval, or before any commission in which the United States is a party or directly or indirectly interested, or receive any compensation of any kind, directly or indirectly, for services of any description rendered by himself or another in relation to any such cause or proceeding."

This amendment, as the "Congressional Globe" shows, prevailed, and those words were stricken out.

The following appear in the course of the debate:

Mr. [REVERDY] JOHNSON (page 555):

"You have extended to courts-martial jurisdiction over almost every variety of crimes. There is hardly

an offense known to the criminal statute which is not more remotely, indirectly or directly of such a character that these courts-martial or military commissions are supposed to have, and certainly assume, jurisdiction. My impression has been, and still is (with no disrespect to the Executive), that these courts-martial are assuming jurisdiction which Congress never contemplated. In all cases of contract to furnish materials to the United States in any Department of the Government, if the Government believe, or have reason to believe, that the party has acted fraudulently in his execution of that contract, he is tried before what they call a military commission," etc.

After this follow pages of debate as to whether or not the word "courts-martial" shall be inserted in the place where it now appears in the statute. Among other things appearing in this debate is the following statement by Mr. HALE (Congressional Globe, page 559):

"Since I have been a member of this body I have seen week after week, and month after month, an advertisement in the journals of this city, the National Intelligencer and some others, of members of the Senate in high standing proffering their services to anybody that had claims against the Government, or against any department of it, and at that time it excited no reproach. That has been condemned now, and against that condemnation I have not a word to say."

Mr. COWAN (Congressional Globe, page 561) said:

"I believe it is proper in making a new law to enquire first what the old law is; second, the mischiefs; and then to look at the remedy. Now, as I understand the mischief which is to be corrected here, it is that members of the Senate and of the House of Representatives are in the habit of appearing in cases where the United States are concerned. I suppose there can be no mischief in their appearing on behalf of the United States. I suppose there is nobody who complains of that here. If there be any mischief at all it must exist in their appearing before certain tribunals, not the judicial tribunals of the country, against the United States."

MR. TRUMBULL said (Congressional Globe, page 561):

"Since this bill has been under consideration I have been informed that money has been paid to procure recommendations to West Point. If that be so, I trust the offender will be brought to justice. Since this bill has been pending, I have heard that officers in the Departments of this Government have received money in order to facilitate claims that were passing through the Departments of the Government. I have heard that where there were many claims pending and it was a great object on the part of the contractors to have their claims acted upon and passed at the earliest day, they have given money to clerks in order to shuffle up their claims, so that they could be acted upon sooner than others."

Again, MR. TRUMBULL said (Congressional Globe, page 561):

"This is not a bill to prevent attorneys from practising in courts of law, but it is a bill to prevent Representatives and Senators in Congress and officers of the Government who are paid for their services from receiving a compensation for advocating claims in the Departments and before the bureaus of the Government, and before courts-martial. That is the particular question that is pending."

Bear in mind right here that Mr. Trumbull was the Chairman of the Judiciary Committee on whose behalf he reported the bill to the Senate, and he had charge of the bill, and he certainly, if any one, ought to know the real purpose of the bill.

HOUSE PROCEEDINGS.

February 17, 1864 (Congressional Globe, page 714), the Act as passed by the Senate (S. B., 28) was taken from the Speaker's table and referred to the Committee on the Judiciary.

June 6, 1864 (Congressional Globe, page 2773), is the following entry:

"SUITS AGAINST THE GOVERNMENT."

"Mr. Wilson, from the Committee on the Judiciary, reported back Senate bill No. 28, relating to members of Congress, heads of Departments and other officers of the Government. The bill was read. It prescribes penalties for members of Congress, heads of Departments, or other officers engaging as attorneys or counselors *in suits against the Government.* The bill was ordered to a third reading; and was accordingly read the third time and passed."

Nothing else appears in the "Congressional Globe," except the entries as to signatures of presiding officers and the report that the bill was approved by the President of the United States, June 11, 1864. The Act itself appears as Chapter CXIX. in the Appendix to the "Congressional Globe" of 1863-4, at page 177.

We maintain therefore that the legislative history of the enactment of this statute, and the language of the statute itself, and the settled principles of law applicable to its construction, show that this statute *was intended to apply to those matters or things and to those matters or things only in which the United States is a party, or in which the United States as a Government has a money or property interest; in the language of Chief Justice* SHAW, *below quoted* (this brief, page 37), "*an interest whereby the United States will gain or lose something by the result of the proceedings,*" and that the statute does not include and was never intended by Congress to include any such question as that of whether or not the mail of a certain person or corporation should be stopped by the issuance of what is called a fraud order, and that the question of the issuance of any such fraud order is not any matter or thing in which the United States is "directly or indirectly interested," within the meaning of this statute.

We proceed to consider the language of said Section 1782.

The restrictive words are "*in which the United States is a party, or directly or indirectly interested.*" Some meaning must be given to these words. The construction placed upon them by the Court gave them absolutely no meaning, as we proceed to show.

The United States has a *pecuniary or property interest* in many things that are before the Departments or officers of the United States, as for example, in the United States domain, lands and buildings, ships, army and navy material, and in other United States property. So also the United States is interested in money claims made against the Government. In most of these cases the United States is a direct party. But in those cases in which it is not a direct party, the United States as a Government must have a pecuniary or property interest in the matter or thing, or there must be some real interest of the United States as a Government by which it will "gain or lose something" as a result of the decision of the matter or thing.

But there are other things before the Departments and officers of the United States in which the United States is not "interested" in any such sense, as, for example, whether a patent shall be issued for an invention, or whether a person's mail shall be stopped and many such things. The statute, Section 1782 above quoted, *necessarily* implies that there are or may be things before the Departments and officers of the United States in which the United States is not "interested," within the meaning of the word "interested" as used in the statute. The prohibition is confined to those things, and to those things only, "*in which the United States is a party, or directly or indirectly interested.*" If the United States is, within the meaning of the statute "*directly or indirectly interested*" in *every* thing which arises before any department or officer of the United States, then these words "*in which the United States is a party, or di-*

rectly or indirectly interested," can have no meaning; for, if omitted, the prohibition would still be the same and would be a prohibition to appear for pay before any Department or officer of the United States "in *any matter or thing* whatsoever." Such is not the language of the statute. Some meaning, therefore, must be given to these words, for it cannot be presumed and it cannot be held that Congress used them without any meaning. These words necessarily carry a limitation. There are, therefore, *some* matters or things before a department or officer of the United States in which a Senator or other officer of the United States may appear for pay. Such things are those in which the United States is *not* "a party, or directly or indirectly interested."

As applied to this case, we maintain not only that the United States is not "interested," within Section 1782, in the issue of a fraud order, but we also maintain that the United States was not "interested" in the subject matter of any of the five visits of the defendant to the P. O. Department, as shown in POINT II., *infra*.

Section 1782 Does Not Say or Mean Things in which the People of the United States are Interested, but Things in which the United States, Meaning the United States, as a Government, is Interested.

All the departments and officers of the United States Government exist for the benefit of the people of the United States, and everything that is before any department or officer or done by them is presumably for the benefit of the people, and in a certain sense the United States is interested in everything that may affect or benefit or injure the people of the United States; but it will not, for this reason, do to say that therefore the United States, within the meaning of the word "interested" as used in the statute, is "inter-

ested " in *everything* that the department and officers of the United States have before them. This would make certain words in the statute meaningless, as above shown. It is a settled and most reasonable canon of construction that every word in a statute and particularly a distinct phrase must have a meaning and be given effect, if possible.

Moreover, the statute does not read " in anything which may affect or benefit or injure the *people* of the United States." The words " United States " in the clause " in which the United States is a party or directly or indirectly interested," mean the United States *as a Government* and not generally the *people* of the United States.

Right here is where the trial Court erred in its decision that the United States was "*directly or indirectly interested*" in the question whether a fraud order should issue against the Rialto Grain and Securities Company. In its opinion (Record, p. 283 *et seq.)*, on the demurrer to the indictment, which demurrer was on the ground, among others, that the matter or thing pending before the Post-office Department in which it was alleged the defendant appeared for pay was not a matter or thing in which the United States was directly or indirectly interested, the trial Court (ADAMS, J.) took the ground that the United States was " interested " in the question whether a fraud order should issue against the Rialto Grain and Securities Company because the United States as a government was bound by its duty to the *people* of the country to enforce the laws. The Court repeated this view in its charge to the jury (Record, pp. 233, 234). But a little reflection will show that the line between what the United States is " interested " in, within the meaning of said Section 1782, and what the United States is not interested in within the meaning of said section can not be drawn on any such ground. By the same reasoning the United States would be " interested " in *all matters whatsoever* before any department or officer of the United States. We have shown above that this can

not possibly be the meaning of the statute, as it would erase and make meaningless words which Congress purposely inserted in it. We have also shown that those words can be given a proper meaning and effect.

Having established the proposition that some matters and things may come before a department or officer of the United States in which the United States is not "interested" within the meaning of that word as used in Section 1782 of the statute, it remains to consider whether the question of the issuance of a fraud order by the Post-office Department against a particular company is a matter or thing in which the United States is "directly or indirectly interested." The United States cannot be interested in the determination of this question in the sense that it has any *money or property* interest in the question. The United States as a government would not "gain or lose" anything by the decision of that question whichever way it might be decided. In short it cannot be "interested" in the question unless the word "interested" in the statute means to include that general interest which the United States has in the welfare of the people, and in the enforcement of the laws for their welfare, and this, as we have seen above, is the only ground upon which the trial Court held that the United States was interested in the matter. But this, as we have seen above, proves too much, and is an inadmissible construction of the statute, for it would wholly nullify the restrictive words "in which the United States is a party, or directly or indirectly interested."

The Kind of Interest of the United States Which is Meant in Section 1782 is Shown by the Things Which the Statute Specifically Mentions, and the "Other Matters or Things" Referred to Are Matters or Things in Which the United States Has a Similar Interest, under the Principle of Ejusdem Generis and Noscitur a Sociis.

The principle or rule here referred to, sometimes called Lord TENTERDEN'S RULE, is as follows:

"Where a statute or other document enumerates several classes of persons or things, and immediately following and classed with such enumeration, the clause embraces 'other' persons or things, the word 'other' will generally be read as 'other such like,' so that the persons or things therein comprised may be read as *ejusdem generis* with and not of a quality superior to or different from those specifically enumerated."

21 Am. & Eng. Encyclopædia of Law, 1012, and cases there cited, including, among others, *Alabama vs. Montague*, 117 U. S., 602, 610.

The words in Section 1782, to wit, "or other matter or thing," necessarily refer to some other matter or thing of the *same class (ejusdem generis)*, that is, other matter or thing in which the United States has some *similar interest*. These words, "or other matter or thing," were inserted in order that the statute, by enumerating certain things, as "contract," "claim," "charge," "arrest," &c., might not fail to cover other such matters or things in which the United States had a real interest. These words were not intended to enlarge or change the *nature of the interest* which the United States must have, as indicated by the enumerated things, to wit: "proceeding, contract, claim, contro-

versy, charge, accusation, arrest"—all appropriate for the war period and for matters affecting army and navy and civil officers and money and property interests.

In the case of the question of the issuance of a fraud order, what difference does it make to the United States Government whether or not it is issued? The question does affect the person whose mail is under consideration, and it may affect the public or certain people in the United States, but it cannot be said to affect the United States as a Government, or to be a matter in which the United States is interested. If the Court was to say that the United States, within the meaning of the word "interested," as used in Section 1782, is interested in the question whether a certain person's mail be stopped, because the United States is "interested" in the proper enforcement of all laws and interested in the general welfare of the people, then where is there any limit to the matters in which the United States is interested? The United States in such a view would be "interested" in everything that is done by or in or before any Department of the United States Government, else why does the United States require or permit such thing to be done by or in or before any of its Departments? These considerations show that the view taken by the trial Court can not possibly be the correct view unless this Court is prepared to eradicate from the statute the words "in which the United States is a party or is directly or indirectly interested," and thus make this a wholesale prohibition applying not to matters or things only "*in which the United States is a party or is directly or indirectly interested*," but to *all matters or things whatsoever* before any Department. Congress did not so enact.

If the United States is "interested" within the meaning of the statute in the question whether the letters of a certain citizen or corporation shall be stopped, it is impossible to state a matter or thing before any Department in which the United States is not inter-

ested. We repeat, the statute carries a limitation on its face. The view of the Court below disregarded this limitation and expunged these words—not a single word, but a whole clause—from the statute. This will not do. We repeat, this will never do!

All of these words of Section 1782, to wit, "proceeding, contract, claim, controversy, charge, accusation, arrest" are *words appropriate for use in connection with matters in which the United States is a party or has a pecuniary or property interest*, especially when these words are taken in connection with the words which follow, to wit, "before any Department, court martial, bureau, officer, or any civil, military or naval commission whatever."

We have stated above that the trial Court construed this statute as if the words "in which the United States is a party or directly or indirectly interested" had not appeared in the statute. But this is not all. The trial Court construed this statute as if the following words had been wholly omitted from the statute:

"*In relation to any proceeding, contract, claim, controversy, charge, accusation, arrest,* or other matter or thing in which the United States is a party or directly or indirectly interested."

In other words, the Court construed the statute as if it read:

"No Senator, Representative or Delegate, after his election and during his continuance in office, and no head of a Department, or other officer or clerk in the employ of the Government, shall receive or agree to receive any compensation whatever, directly or indirectly, for any services rendered or to be rendered to any person, either by himself or another, before any Department, court martial, bureau, officer or any civil, military or naval commission whatever."

The proposition of the trial Court was that the United States was, within the meaning of the statute, "interested" in EVERYTHING *which has to do with the enforcement of the law.* Another way of stating this

would be, that the United States is "interested" in *everything* with which the United States or any Department of the United States has anything to do; else why would the United States or any Department of the United States deal with such a thing at all? To construe the statute thus would make it an absolute prohibition against appearing at all before any department, etc., for under this view nothing could come before a department, etc., except matters in which the United States was interested. If the United States is, within the meaning of the statute, "interested" in *all* matters that can come before any department, etc., why should not Congress have prohibited a Senator from appearing for pay before a department, etc., *for any purpose whatsoever*. Such is not the prohibition of the statute. And the language of the statute expressing a limitation shows that Congress intended no such absolute and general prohibition.

We are not here asking this Court to lay down any general or universal rule with regard to the construction of Section 1782 of the Revised Statutes, which will cover all possible future cases that may arise under it, nor are we asking this Court to define in general language the kind of interest which the United States must have in order that the thing in which such interest exists may be within the prohibition of the statute. In our judgment the proper method for the Court to pursue with reference to this statute is the method which was so well laid down by Mr. Justice MILLER in the case of *Davidson vs. New Orleans*, 96 U. S., 97, where he said, speaking of the construction of the Fourteenth Amendment of the Constitution of the United States (page 104):

"If, therefore, it were possible to define what it is for a State to deprive a person of life, liberty, or property without due process of law, in terms which would cover every exercise of power thus forbidden to the State, and exclude those which are not, no more useful construction could be furnished by this or any other court to any part of the fundamental law.

But, apart from the imminent risk of a failure to

give any definition which would be at once perspicuous, comprehensive and satisfactory, *there is wisdom, we think, in the ascertaining of the intent and application of such an important phrase in the Federal Constitution, by the gradual process of judicial inclusion and exclusion, as the case presented for decision shall require, with the reasoning on which such decisions may be founded.* This court is, after an experience of nearly a century, still engaged in defining the obligation of contracts, the regulation of commerce, and other powers conferred on the Federal government, or limitations imposed upon the States.

As contributing, to some extent, to this mode of determining what class of cases do not fall within its provision, we lay down the following proposition, as applicable to the case before us :"

Applying this principle of construction to the present case, we maintain that the United States is not "directly or indirectly interested" in the question whether a fraud order should issue against the Rialto Grain and Securities Company. The United States is not a party and has *no money or property interest involved.* It is of course true that if a fraud order were issued and the mail of the Rialto Grain and Securities Company were stopped, the United States, to the slight extent that postage was not received by reason of such mail being stopped, would receive less mail revenue; but it is also true that the United States would perform a correspondingly less amount of mail service, and this one fact would counterbalance the other, so that the United States could not be said to be "interested" for any such reason.

The learned counsel for the United States have utterly failed to point out, and it is in the nature of things impossible to point out, any possible interest which the United States can have in the issuance of a fraud order against the Rialto Grain and Securities Company, unless it be that general interest which the United States has in the general welfare of the people. That such a *general interest* is not sufficient, in a statute that makes it a condition that the United States be

"interested" in order that the statute shall apply, is abundantly shown by the decisions below quoted. We have shown above, however, that such a construction of the statute is inadmissible, as it would in effect strike out certain sentences of the statute and do violence to the intentions of Congress as expressed in the statute.

We, therefore, applying the principles of construction stated by Mr. Justice Miller in the case of *Davidson vs. New Orleans*, above quoted, maintain that the question of the issuance of a fraud order against the Rialto Grain and Securities Company, is not included in this statute as a matter or thing in which the United States is "directly or indirectly interested."

The interest which the United States must have in a matter or thing in order to bring the matter or thing within the prohibition of Section 1782 of the Revised Statutes, must, under the ordinary rules and principles of law which must necessarily govern in cases of this kind, be, in the language of Mr. Chief-Justice Shaw in the case of *Inhabitants of Northampton vs. Smith*, 11 Metcalf, 390, 395, cited on this brief (p. 37):

"One that is visible, demonstrable and capable of precise proof"; one in which the United States "will gain or lose something" by the decision.

Under the general rules and principles of law and the adjudged cases, it is well settled that when the existence of an interest is alleged, the precise nature of the interest must be disclosed by the pleadings or by the proof. A general allegation of an interest or concern in the matter, without showing definitely and precisely how that interest arises or exists, is never held to be sufficient. If the interest exists, it must necessarily be capable of exact and precise allegation and proof.

When Congress referred to a "matter or thing in which the United States is a party or directly or indirectly interested," Congress meant such an interest

on the part of the United States as under the ordinary rules and principles of law is capable of precise and definite allegation and proof. Congress did not mean any such vague interest as a general concern for the general welfare of the people of the United States. If it did mean any such vague general interest or concern, then everything possible which goes on within the borders of the United States, or even outside the borders of the United States, is a matter in which under such a view the United States would be "directly or indirectly interested." But Congress when it passed this statute was not dealing in any such vague generalities.

Congress Used Words Which Under the Decisions of the Courts of This Country and of England had a Technical Meaning, and Therefore Congress Must Have Used Them in Such Technical Meaning.

This statute was carefully considered by the Judiciary Committee of the Senate, a committee consisting of eminent lawyers. It was reported by the Judiciary Committee, by Senator TRUMBULL of Illinois, an eminent lawyer and judge; and all of these members of the Judiciary Committee as well as the other lawyers of the Senate must have understood that the word "interested" in the statute was used in the ordinary legal sense in which the word interested had been used time and again in the statutes in every State in this country. There is no purpose shown in the statute and no purpose shown in the debates of Congress when it enacted this statute of departing from the ordinary and well-settled meaning of this word "interested" as it had been declared by numerous and uniform decisions of the Courts in this country as well as in England.

Adjudged Cases Showing the Legal Meaning of Word "Interested," as Used in Statutes.

The word "interest" or "interested" as used in Section 1782 Rev. Stats. had a well-settled legal meaning well known to the lawyers who framed that section, which meaning is in direct conflict with the opinion and decision of the trial Court in this case.

The case of *Inhabitants of Northampton vs. Smith*, 11 Metcalf (Mass.), 390, involved the construction of a statute of Massachusetts which provided, page 393, "that when a judge of probate shall be *interested* in any case within his jurisdiction, the case shall be transferred to the probate court of the most ancient adjoining county." The facts and the decision of the Court are sufficiently stated in the opinion of Chief-Justice SHAW as follows (page 393):

"This was an appeal from the decree of the judge of probate of the county of Hampshire, by which he declined, on account of interest, to take jurisdiction of the probate of the will of Oliver Smith, late of Hatfield, and directed the proceedings upon said will to be transferred to the court of probate of the County of Worcester, being the most ancient adjoining county. This objection is founded upon the provision of the Rev. Sts. c. 83, Sec. 15, directing that when a judge of probate shall be interested in any case within his jurisdiction, the case shall be transferred to the probate court of the most ancient adjoining county. The interest of the judge was supposed to arise from the fact, that he was one of the inhabitants of the town of Amherst; that there were, in this will, many bequests to charitable purposes, for the use and benefit of classes of persons described as dwelling in eight towns enumerated, of which towns Amherst is one; that if those bequests were beneficial to these towns, they had an interest, in their corporate capacity, in establishing the bequests, and of course in proving the will; and that by means thereof, Mr. Conkey, the judge of probate, as an inhabitant of Amherst and a member of

the corporation, had a derivative interest in the same bequests.

* * * * * *

(p. 394) "II. But the great question, and the one raised on the appeal, is, whether the judge of probate, as an inhabitant of the town of Amherst, and a member of that municipal corporation, had such an interest in this will, within the meaning of the statute, as to supersede his jurisdiction of the probate of the will, and transfer it to another county.

"It is true that the plain dictates of natural justice, independently of all articles of *magna charta*, bills of rights, or other provisions of positive law, require that a man shall not be judge in his own cause. And it is only a just application of this principle, that he shall not sit in judgment in deciding a question, in which he has a personal interest. But this, like all other very general propositions, in order to make it the basis of a practical rule, must have a reasonable construction, and must be taken, not as absolute and invariable, but with all necessary and implied qualifications. *If the term 'interest' were used in the loose sense it sometimes is, consisting in a strong and sincere desire to promote all enterprises for the advancement of learning, philanthrophy, and general charity, or a similar interest, with all good men, to repress and put down pernicious and mischievous schemes, no man could be found, fit to be intrusted with the administration of justice; for no man can be exempt from such interests.* But even where there are pecuniary interests, there must be some exceptions; as when the Commonwealth is a party in a criminal prosecution or a penal action, where the penalty enures to the State, and all civil suits on recognizances and other debts, or for the recovery of property, every citizen has a pecuniary interest. And yet none but citizens can be judges. Our own declaration of rights has made some approximation towards a limitation of the generality of the maxim, by declaring (art. 29) that 'it is the right of every citizen to be tried by judges as free, impartial and independent, as the lot of humanity will admit.' It is obvious that no nearer approximation to the rule of absolute impartiality can be made, by any system of laws.

"We are then to consider what is the nature of the interest, intended by Rev. Sts. c. 83, Sec. 15, which shall take the case out of the jurisdiction of the judge of probate, and transfer it to the court of probate of an adjoining county.

"1. We think it is not to be a mere possible, contingent interest; not an interest in the question or general subject, to which the matter requiring adjudication relates, but one that is visible, demonstrable, and capable of precise proof (*Cottle, Appellant*, 5 Pick., 483; *Sigourney v. Sibley*, 21 Pick., 101, and 22 Pick., 507). It is not the bias or prejudice which would be sufficient to set aside a juror (*Davis v. Allen*, 11 Pick., 466). It is to be considered that such an interest, in the judge of probate, is not only to oust him of his jurisdiction, but is to confer jurisdiction on another court of probate, which otherwise would not have it. It must therefore depend upon facts capable of being precisely averred and proved, and thus put in issue and tried. The importance of this consideration will be appreciated, when it is considered, that if jurisdiction is taken by a probate court, not entitled to it by law, the entire proceedings are void; the practical consequences of which may be extensively injurious (*Holyoke v. Haskins*, 5 Pick., 20; *Coffin v. Cottle*, 9 Pick., 287).

"2. It must be a pecuniary or proprietary interest, a relation by which, as a debtor or creditor, an heir or legatee, or otherwise, he will gain or lose something by the result of the proceedings, in contradistinction to an interest of feeling, or sympathy, or bias, which would disqualify a juror (*Smith v. Bradstreet*, 16 Pick., 264).

"3. It must be certain, and not merely possible or contingent (*Hawes v. Humphrey*, 9 Pick., 350; *Wilbraham v. County Commissioners*, 11 Pick., 322; *Danvers v. County Commissioners*, 2 Met., 185). It must be direct and personal, though such a personal interest may result from a relation, which the judge holds as the member of a town, parish or other corporation, where it is not otherwise provided by law, if such corporation has a pecuniary or proprietary interest in the proceedings.

"*It may be, and probably is, very true, as the human mind is constituted, that an interest in a question or subject matter, arising from feeling and sympathy, may be more efficacious in influencing the judgment, than even a pecuniary interest; but an interest of such a character would be too vague to serve as a test by which to decide so important a question as that of jurisdiction; it would not be capable of precise averment, demonstration and proof; not visible, tangible or susceptible of being put in issue and tried; and therefore not certain enough to afford a practical rule of action.* It is like

the principle applying to the case of the competency of a witness; a direct pecuniary interest, however small, on being proved, renders him incompetent; but the strongest interest from sympathy, from interest in the question, and even an expected interest in the property in controversy, not yet vested, does not render him incompetent.

On examining this will of Oliver Smith, we cannot perceive that it vests any pecuniary interest, legal or beneficial, in the towns named, other than Northampton. The will provides for the future annual distribution of considerable sums of money in charity for the relief and assistance of various classes of indigent persons to be selected from those residing within the limits of these towns. But the distribution of a sum of money within the limits of a town, although it may give a spring to business, and indirectly benefit the inhabitants, as members of society, and holders of property, yet is not a direct pecuniary interest to the town in its corporate capacity, through which its members derive a pecuniary interest. And although it may be said, in a loose sense, that such a provision for various classes of persons, and the distribution of so much money, would be of great benefit to the town, and although the inhabitants of such town would feel strongly inclined to aid in promoting and establishing such a charity, and even be willing to pay money in securing it, yet, when strictly considered, it means only that such an establishment would be useful and beneficial to the dwellers in such town; not that it would confer any corporate right upon the town. It affords no direct or necessary exemption from taxes. It is the same interest which the inhabitants of a town often feel and manifest in the establisment of a college, academy, hospital, and even a court house and jail, within their limits.

The Court are therefore of opinion that the town of Amherst, as a municipal corporation, in its corporate capacity, takes no pecuniary interest, legal or beneficial, under this will, and that, of course, Mr. Conkey, Judge of Probate, as an inhabitant of that town, takes no such interest; that he is not prevented from taking jurisdiction of the probate of this will, and that no other probate Court of the Commonwealth can take jurisdiction of it.

The decree of the probate Court is reversed, and the case remitted to that Court for further proceedings in

the probate of said will, and the settlement of the said Oliver Smith's estate."

A very pertinent case is that of *McGrath vs. The People ex rel. Linnemeyer*, 100 Ill., 464. The case and the decision on this point are stated accurately in the second paragraph of the headnote, as follows :

" The State is not ' interested, as a party or otherwise,' in a proceeding in the nature of a *quo warranto* to try the title of a person to an office into which it was alleged he had intruded, in any such sense as would give to the Supreme Court jurisdiction to hear an appeal in such a proceeding directly from the trial court, under Section 88 of the Practice Act. The interest which the State must have in a cause, within the meaning of this section, in order to entitle either party to bring it directly to the Supreme Court from the trial court, is a substantial interest—as, a monetary interest."

This is directly contrary to the views taken by the trial Court in the present case. The trial Court in the present case held that the United States was interested in the question of the issuance of a fraud order, because of its general interest on behalf of the people that the laws should be enforced. In this *quo warranto* case of *McGrath vs. The People* the Illinois Supreme Court held that the State was not " interested, as a party or otherwise," in a *quo warranto to try title to an office created by the laws of Illinois*. This holding is utterly at variance with the holding of the trial Court in the present case, that a general interest or concern that laws should be enforced, is enough to make the United States Government " interested," within the meaning of Section 1782 of the Revised Statutes, in the question whether a person's mail should be stopped.

In the case of *Evans vs. Eaton*, 7 Wheaton, 356, a question in this Court was whether a Mr. Frederick was a competent witness, the alleged objection to him

being that he was interested in the cause. This Court, however, held that he was not interested and that he was a competent witness. Mr. Justice STORY, giving the opinion of the Court, said (page 425):

"If the patent is declared void, the invention may be used by the whole community, and all persons may be said to have an interest in making it public property. But this results from a general principle of law, that a party can take nothing by a void patent; and so far as such an interest goes, we think it is to the credit and not to the competency of the witness."

It appeared in this case that Mr. Frederick was in a business where he might make use of the article alleged to be patented if the patent were to be declared void, and that in a certain sense he had an interest to have it declared void. On this point the Court, speaking by Mr. Justice STORY, said (page 425):

"But the special notice in this case asserts matter, which if true, and found specially by the jury, might authorize the Court to adjudge the patent void; and it is supposed that this constitutes such an interest in Frederick in the event of the cause that he is thereby rendered incompetent. But in this respect, Frederick stands in the same situation as every other person in the community."

In the case of *State vs. Sutton*, 74 Vt., 12, the case and decision are sufficiently stated in the following extract from the opinion of the Court:

"This is an indictment under Section 5072 of the Vermont Statutes, for defaming this court, and a judgment thereof, and the judges of the court as to said judgment. It is objected that Judge WATSON, who sat below, was disqualified by reason of interest in the event of the cause or matter, for that he is one of the judges alleged to have been defamed. It is a pecuniary interest that disqualifies, and Judge WATSON is no more interested in this case in that respect than he is in every other criminal case that he tries, and that interest is too small for the law's notice. *State v. Batchelder*, 6 Vt., 479. It is said that a judge defamed

would be deeply interested to have the respondent convicted, not only that he might be severely punished, but also for the aid it might afford him in the prosecution and maintenance of a civil action for damages. But such an interest does not disqualify," etc

In the case of *Foreman et al v. Town of Marianna*, 43 Arkansas 324, the Court held that a judge who was a taxpayer in a town was not disqualified to sit in a case relating to the annexation of the town to a municipal corporation. On this point the Court said (page 329):

" It is objected here that the County Judge was disqualified, being a citizen and a tax-payer of the town. It does not appear that his authority was challenged by any proper motion in the County Court, and we are free to say, that if it had been the objection ought not to have prevailed. It may be hoped that every good Judge in the State is deeply interested in everything that may help or hurt the community; and that he will favor the former and oppose the latter in all legitimate ways. Here the question is not one of taxes and burdens, but one of police. It does not even appear that, on the whole, the result of annexation, would be to increase or diminish taxes. But that is of no importance. This not a suit of a personal nature, concerning property or rights of persons. A general interest in a public proceeding, which a Judge feels in common with a mass of citizens, does not disqualify. If it did, we might chance to have to go out of the State, at times, for a Judge. The interest which disqualifies a Judge, under the Constitution, is not the kind of interest which one feels in public proceedings, or public measures. It must be a pecuniary or property interest, or one affecting his individual rights; and the liability or pecuniary gain or relief to the Judge must occur upon the event of the suit, not result remotely, in the future, from the general operation of laws and government upon the *status* fixed by the decision."

In the case of *Taylor et al. vs. Commissioners of Highways of Town of Normal*, 88 Illinois, 526, the

Court stated the question involved and the decision as follows (page 527):

"The only question of any importance presented by this record is, whether a person has a right to appeal from the decision of the commissioners of highways in laying out a new road or vacating an old one, who does not own land adjoining the road laid out or vacated.

The statute which authorizes an appeal from the decision of the commissioners of highways to three supervisors, provides, '*any person or persons interested in the decision of the commissioners of highways* in determining to, or in refusing to lay out, alter, inclose or vacate any road, or revoking any previous order or decision relative to any road, or from the verdict of any jury in assessing damages in opening, altering or vacating any road, may appeal from such decision to three supervisors of the county,' etc. The word "interested" must receive a reasonable construction, such as will, on the one hand, protect those who have a direct and substantial interest in the matter, and, on the other hand, protect the commissioners of highways from unnecessary litigation in defending their action as such, at the suit of persons who may imagine they have an interest, when in fact they have no such interest as was contemplated by the legislature. Every citizen of a county, in one sense, has an interest in the public highways. So, too, it may be said, and properly, that every citizen of the State has an interest in the highways in the different counties of the State. If, therefore, the language of the statute is to be interpreted literally, an appeal might be taken by any citizen of the State. But we apprehend it was not the intention of the legislature that the word "interested" should receive such a liberal construction. It was, doubtless, intended to give the right of appeal to those persons who had a direct and pecuniary interest not shared by the public at large, such as owned land adjoining the new road laid out or the old one vacated. * * *

We are, therefore, of opinion that no person has the right of appeal except those who may own lands adjoining the road to be laid out or vacated."

Chicago, Burlington and Quincy Railroad Company vs. Kellogg, 54 Neb., 138, was a suit to vacate a judg-

ment rendered against the railroad company in an action at law for damages. The facts are stated in the opinion of the Court as follows (page 404):

"The Honorable F. B. BEALL was the judge who presided at the trial of the law case, and he also presided at the trial of the case at bar. When this case came on for trial, counsel for the railway company objected to Judge BEALL hearing it, claiming that he was interested, and therefore disqualified from hearing this case. The railway company's objections were overruled, and Judge BEALL heard and determined the case at bar; and this action is the first argument made here for a reversal of the judgment. Section 37, c. 19, Comp. St., provides that: "*A judge * * * is disqualified from acting as such * * * in any case wherein he is interested * * *.*" But the word "interested", found in this section of the statute, probably means "pecuniarily interested", or at least it means that a judge, to be disqualified from hearing a case, must be in such a situation with reference to it or the parties that he will gain or lose something by the result of the action on trial. It is not claimed that Judge BEALL will gain or lose anything from the result of this action. It is not pretended that he has any pecuniary interest in the matter. The argument seems to be that, because he rendered a law judgment, he would naturally be desirous that the same should be sustained, and that, therefore, his inclination would be to defeat this suit. It can never be presumed that a judge will permit his desires or inclinations to control his decision in any manner; and that he tried the case and rendered the judgment which is sought to be vacated by this action does not render him interested and disqualified, within the meaning of said section of the statute."

In the case of *Sauls vs. Freeman*, 24 Fla., 209, the statute in question, as stated by the Court (page 527), "provides that no judge of any Court or justice of the peace shall sit or preside in any cause in which he is a party, or *in which he is interested*" etc. The Supreme Court of Florida held that the fact that the Circuit Judge, with other registered voters of the country, signed a petition addressed to the County Commis-

sioners, asking for the change of the county site, did not disqualify him on the ground of interest from sitting in a mandamus proceedings instituted by some of the petitioners to compel the commissioners to call an election on the question of changing the county site. The Court said (page 528), " The interest meant by the statute is property interest "—citing numerous cases.

In *Bowman's* case, 67 Missouri, 146, a disbarment proceeding, it was held that the fact that the Judge trying the case was an honorary member of the Bar Association of St. Louis which preferred the charges, did not disqualify him as one interested. The Court said, NAPTON, J., (page 150) :

" We are of opinion that the position of Judge BOYLE, as an honorary member of the Bar Association, did not disqualify him from sitting in the case, since he had not a particle of pecuniary interest involved."

Scores of similar cases to the same effect might easily be cited. It is enough, however, merely to call the attention of this Court to this well-established meaning of the word " interested."

This Statute, Section 1782, is a Criminal Statute, and is to be Interpreted as a Criminal Statute.

If there exist any doubts as to the true construction of the statute, and if under one fair construction of the statute an alleged act is innocent, and if under another possible construction of the statute an alleged act is criminal, then that construction must be given to the statute under which the act is innocent. Any other course would render the statute a trap for the unwary. The statute, like any other statute and

especially a statute which makes an act a crime, and especially a statute denouncing fines, imprisonment, forfeiture of office and perpetual infamy, must be strictly construed. Such a statute must look out for itself. If an alleged act is not *clearly* within the prohibition of the statute, then on the general principle of the presumption of innocence and of fairness to an accused person, it must be held that such alleged act is not within the language of the statute.

Applying these principles of construction to the present case, if we adopt the *ordinary and well-settled meaning* which has been given to the word "interested" as it appeared in the numerous statutes of the States, namely, to indicate a pecuniary or property interest, an interest whereby the United States gains or loses something, then the question whether the mail of the Rialto Grain and Securities Company should be stopped is clearly not a matter or thing in which the United States is a party or directly or indirectly interested. Any other construction of the word "interested" opens wide the door, so that it would be impossible to draw the line anywhere so as to exclude any matter or thing whatsoever as a matter or thing in which the United States was not interested. Any such construction would be a departure from the "interest" which Congress had in mind, as shown by its legislative occasion and history when this bill was enacted, and would be a departure from the well-settled legal meaning of the word "interested" as it was used in law and in statutes when this statute was enacted.

It is to be taken into consideration, too, that this statute, Section 1782, even in those things in which it clearly applies, deals not with a thing which is an evil in itself, *malum in se*, but with a thing which, for supposed motives of public policy, it is wise to prohibit—*malum prohibitum*. There is no reason or necessity, therefore, in the nature of things, why any Court should seek to include within the language of the statute any-

thing except what is clearly and unquestionably included therein.

In the case of *United States vs. Wiltberger*, 5 Wheaton, 76, an indictment for manslaughter under a United States statute, this court, Chief Justice MARSHALL giving the opinion, said (page 95) :

"The rule that penal laws are to be construed strictly, is, perhaps, not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals ; and on the plain principle that the power of punishment is vested in the legislative, not in the judicial department. It is the legislature, not the court, which is to define a crime, and ordain its punishment."

In *United States vs. Sheldon*, 2 Wheaton, 119, a question arose under a penal statute of 1812 which prohibited "transporting," &c., between the United States and Canada, whether the driving of living fat oxen was "*transporting*" such oxen within the meaning of the statute, and the Court held that it was not. The language of the statute was (page 120) :

"That if any citizen of the United States, or person inhabiting the same, shall transport or attempt to *transport*, over land or otherwise, in any wagon, cart, sleigh, boat, *or otherwise*, naval or military stores, arms or munitions of war, or any articles of provision from the United States to Canada," etc.

The Court held that living fat oxen were articles of provision and munitions of war. The Court, however, held that the driving of oxen over land was not "*transporting*" them "in any wagon, cart, sleigh, boat, *or otherwise*." This case furnishes a very pertinent illustration of the rule that in order that an act may be construed to be within a penal statute, it must clearly be within it, and that courts will never construe an act as within a statute unless it is clearly so. In this case the evil consequences of the act to the United States were just as great whether the cattle were driven over land on foot or whether they were carried in wagons, but the Court, of course, held that

it could not punish the act unless it was clearly within the statute.

So in the case of *United States vs. Morris*, 14 Peters, 464, a case of indictment under a statute prohibiting the slave trade, this Court, Mr. Chief Justice TANEY giving the opinion, said (page 475):

"In expounding a penal statute the Court certainly will not extend it beyond the plain meaning of its words; for it has been long and well settled that such statutes must be construed strictly."

In the case of *United States vs. Clayton*, 2 Dillon, 218, the Circuit Court (DILLON and CALDWELL, JJ., sitting), held that Powell Clayton, Governor of the State of Arkansas, was not an "officer of election," within the meaning of a penal act of Congress, although it was a part of his duty to issue and he did issue a certificate of election. The Court said (page 225):

"It belongs only to the legislative department to create crimes and ordain punishments. Accordingly, courts, in the construction of statutable offences, have always regarded it as their plain duty cautiously to keep clearly within the expressed will of the legislature, lest otherwise they shall hold an act or an omission to be a crime, and punish it, when, in fact, the legislature had never so intended. 'If this rule is violated,' says Chief Justice BEST, 'the fate of the accused person is decided by the arbitrary discretion of the Judges and not by the express authority of the laws' (*Fletcher vs. Lord Sondes*, 3 Bing., 580).

The principle that the legislative intent is to be found, if possible in the enactment itself, and that the statutes are not to be extended by construction to cases not fairly and clearly embraced in their terms, is one of great importance to the citizen. The courts have no power to create offenses, but if by a latitudinarian construction they construe cases not provided for to be within legislative enactments, it is manifest that the safety and liberty of the citizen are put in peril, and that the legislative domain has been invaded. Of course, an enactment is not to be frittered away by forced constructions, by metaphysical niceties, or mere

verbal and sharp criticism, nevertheless the doctrine is fundamental in England and American law, that *there can be no constructive offenses ; that before a man can be punished his case must* be plainly and unmistakably within the statute, and if there be any *fair doubt whether the statute embraces it, that doubt is to be resolved in favor of the accused.* These principles of law admit of no dispute, and have been often declared by the highest courts, and by no tribunal more clearly than the supreme court of the United States *(United States v. Morris,* 14 Pet., 464 ; *United States v. Wiltberger,* 5 Wheat., 76 ; *United States v. Sheldon,* 2 *ib.,* 119. And see, also, *Ferret v. Atwill,* 1 Blatchf., 151, 156 ; Sedgw., Const. and St. Law, 324, 326, 334 ; 1 Bish. Cr. Law, secs. 134. 135)."

This statute, Section 1782, has been on the statute books since 1864, and so far as we have been able to learn, the prosecution of the defendant Senator BURTON is the first prosecution that has ever been had or attempted under this statute. We venture to state our judgment that before this prosecution was begun there had been scores of instances where members of Congress who were lawyers had made for their clients inquiries in the Departments, in the same way that Senator Burton made inquiries in the present case—inquiries not at all connected with any matter in which the United States was a party or had any pecuniary or property interest. But inquiries which concerned only private persons or corporations—and that no one of such members of Congress ever supposed that he was thereby doing anything prohibited by Section 1782 of the Revised Statutes, because he had not the remotest idea that the United States was " a party or directly or indirectly interested " in the matter of his investigations or the matter in which his services were thus rendered.

Conclusion as to "Interest" Stated.

For these reasons we maintain that the Court erred as stated in POINT I., *supra* (p. 20) in holding that the United States was "interested" in the question whether a fraud order should issue against the Rialto Company, and therefore the whole basis of the indictment fails.

Further Special Point as to "Interest."

BUT IF IT BE OTHERWISE, we maintain that the United States was, at all events, not "interested" in any matter or thing before the department which was the subject matter of any of the visits, inquiries or statements of the defendant in the Post-office Department, which matters or things had no reference to any fraud order, but related wholly to other matters or things which were legitimate and proper, and not prohibited by any possible view of Section 1782, even if such matters or things had been alleged (as they were not) in the indictment. This is shown by the evidence, which we proceed to consider at large in our next POINT.

II.

TOTAL FAILURE OF PROOF OF CHARGE.

There was no evidence in the case to establish the guilt of the defendant of the offenses charged in the indictment or any of them, or of any offense whatever, and the Court erred in refusing at the close of the Government's case (p. 165), **and also at the close of the trial to direct the jury to return, as to each count, a verdict of not guilty** (p. 229).

COCHRAN testifies (Record, pp. 146, 147) as follows:

"Q. At any time from the beginning of Senator's Burton's indication to you that he had any connection with the Rialto Grain and Securities Company, there was no discussion between you and him, was there, as to the issuance or non-issuance of a fraud order as it is called, against the company? A. I think not.

* * * * * * * *

"Q. I understand you, then, that you are not able to recall any occasion upon which the Senator made any representation to you or had any conversation with you with reference to the issuance of a fraud order? A. No, sir.

* * * * * * * * *

"Q. There was no discussion between you was there, on this occasion, of the merits of the representations of Mrs. Evans or Mrs. Hout? A. No, sir.

* * * * * * * * *

"Q. It is a fact, isn't it, as you recall, this occasion when senator was advised of these two complaints [of Hout and Evans], was the only one upon which he was advised of any complaints having been lodged against the company? A. That is my recollection of the matter."

Testimony of WILLIAM E. COCHRAN, *Chief Post-office Inspector, at Washington, the Government's witness to sustain the charge in the indictment.*

THE CHARGE AND ONLY CHARGE IN THE INDICTMENT is that the defendant "rendered services in the Post-Office Department for compensation," in a matter or thing pending in the department, which matter or

thing was whether a "fraud order" should issue against the Rialto Company, and which services so rendered were rendered to induce the department to make a decision of such fraud order inquiry favorable to the Rialto Company.

Under this POINT we undermine the whole foundation of the prosecution on the merits. We show from the record that the defendant rendered no service whatever in the department having any reference to the issue of a fraud order. We show from the record that the defendant did not even know that any fraud order inquiry was "before" the department or was "pending" for decision therein. If it be a fact that any such inquiry was pending for decision, we establish affirmatively that the defendant did not even know of the pendency of any such inquiry. We shall show from the record that not one of the five visits of the defendant to the department had the slightest reference to the issue of a fraud order, and that every one of such visits related distinctly to other matters than the issue of a fraud order, and we go further and show that every one of such visits was for a perfectly legitimate and proper purpose.

The Government by its testimony shows five occasions only upon which Senator Burton made visits to or had communication with William E. Cochran, Chief Post-office Inspector, four of which communications with this officer were had upon visits made by Senator Burton to the Post-office Department, and one in Senator Burton's office in Washington at the instance of Senator Burton. Cochran is the only witness the Government produced who testified about the visits and communications of Burton to or with the department, except that Cochran's private secretary (Record, page 148) testified to being present at one occasion. It is our purpose under this point to show from the testimony the occasion of each visit, the purpose of each visit, and what conversation was had and *all* that was said or done between Burton and Cochran or any official of the Post-office Department. This we shall

do from the testimony, referring to the pages of the record where the same can be found and omitting not the slightest word in the record that can throw any light upon this inquiry.

So far as the record shows, no other act was done or statement made than was involved in these visits and no other word fell from the lips of Senator Burton touching or respecting the question at issue than we shall present to the Court in the summation to follow. Our object is palpable, and we frankly state at the outset that not a syllable of this proof sustains the charge of the indictment that Senator Burton performed any services, or did any act, overt or covert, or made any statement or representation which might, could, would, or should influence the action of the department in granting or refusing the fraud orders as alleged in the indictment.

It is our further purpose to assert as matter of law flowing from this proof and all this proof that nothing that he did was within the prohibition of Section 1782, or even tended in the slightest degree to the violation of that act in letter or in spirit.

A.

The first visit of Senator Burton to the department, November 20, 1902.

RE DENNIS INDICTMENT.

Following Senator Burton's employment (the occasion and purpose of which is fully made clear in another part of this brief) (p. 8 *et seq.)* which employment was effected by agreement on November 18, 1902, Senator Burton received from Harlan the letter of that date to be found on page 91 of the record, which was the first communication he had from either Dennis or the Rialto Grain and Securities Company, or any one for

them, after Burton's employment. This letter closes with the following words:

"I do not know what reports have been sent into the Post Office Department at Washington, nor am I prepared to say that the Government intends to make a case against Major Dennis; but if you can find it convenient to inquire of these facts at the Department, you may be able to perform for us a great service at this time. Should any action be taken here by the Grand Jury, I will wire you at once."

This letter is fully explained in another part of our brief (p. 98). Upon receipt of that letter, Senator Burton visited the department and sought to obtain from Mr. Cochran the information asked for. The testimony relating to this visit is as follows: W. E. Cochran (Record, page 140) testifies:

"Q. You have been sworn in this case? A. Yes, sir.

Q. And your name has been given to the jury? A. Yes, sir.

Q. I will get you to state, Mr. Cochran, whether, at any time between the 18th of November, 1902, and the 26th day of March, 1903, you saw the defendant, Senator Burton, at the Post Office Department in Washington? A. Yes, sir; I did.

Q. Will you state to the jury the first time that you saw him there when any allusion, if any such was made, was made to you in reference to the Rialto Grain and Securities Company?

A. I cannot fix the date of the first visit from any independent recollection; but my best recollection is that the first visit was made before that case had been sent out for investigation (Error of Witness on this Point, see Rec., p. 216).

Q. Do you recall any visit that was made to the Department in reference to the complaints of Hout and Evans, and whether you gave him any information as to the pendency of those complaints? A. Yes, sir; he called at the department some time after the case had been made up, and I told him that the case had been made up and sent out for investigation, and gave him the names of the complainants.

Q. Was that the first visit to the Department in reference to the matter, or had he been there before?

A. I stated that my recollection was that he had made a visit of inquiry before any case had been made up and sent out for investigation.

Q. Can you state what he said, in that inquiry, substantially?

JUDGE KRUM: I submit that is not material in this case; that was before anything had been begun, on the theory of the Government.

Objection sustained.

COL. DYER: Q. What transpired at this interview, when you told him of the complaints of Hout and Evans, and the case being made up against the Company, any further than that? A. He said that all the difficulty arose from Major Dennis's connection with the Brooks Brokerage and Commission Company. I will have to correct that—that all the trouble arose from that company, and that Maj. Dennis had succeeded and formed a new company which had taken over the business of the old company.

Q. What, if anything, did he say with reference to the Rialto Grain and Securities Company that had been organized after the Brooks Brokerage Company had been organized? A. He said that Company was doing a straight business and was all right."

The foregoing is *all* of Cochran's testimony in chief as to the visit of Nov. 20.

In the examination and cross-examination of Mr. Cochran the several visits were discussed and the following admissions of Cochran on his cross-examination are to be found which include and characterize and limit the conversation and discussion at all of the visits (Record, page 146): In reading this testimony it is to be borne in mind that Cochran is the only witness by whom the Government sought to prove that Burton rendered the alleged "services" before the P. O. Department:

"Q. I understand you, then, that you are not able to recall *any occasion* upon which the senator made any representation to you or had any conversation with you with reference to the issuance of a fraud order? A. No, sir.

Q. I understood you correctly, didn't I, Mr. Cochran, that at the time of Senator Burton's first inquiry, that is in regard to these two letters from the ladies in

Albany, Mrs. Hout and the other one, those letters had already been referred in the course of the business in the Department, to St. Louis, and were in the hands of the inspector there. Was that correct, or hadn't that happened at that time? A. No, sir; I stated my best recollection was that the senator had made inquiry before any complaint whatever had been received [Witnesses' Error, Rec., p. 216].

Q. I know. But the inquiry he made after the complaints were in, was made after these complaints had been sent out to St. Louis? A. Yes, sir.

Q. So they were not pending before you, or pending before any officer of the Post Office department in Washington? A. Well, they were in the hands of the inspector in charge at St. Louis.

Q. That is what I mean, they were out here? A. Yes, sir.

Q. The senator, therefore, was not shown those letters upon the occasion of his visit to your office for the purpose of that inquiry because they were here, and of course would not be shown to him in Washington? A. No, sir; the only information I could give him was the carbon, which would simply have on it the name of the complainants.

Q. You could give him that information and that was all the information you could give him there? A. Yes, sir.

Q. There was no discussion between you was there, on this occasion, of the merits of the representations of Mrs. Evans or Mrs. Hout? A. No, sir.

Q. The only thing that was indicated to the senator by yourself was that, as appeared by this wrapper, these two complaints had been filed and had been referred to the proper officer in St. Louis? A. Yes, sir.

Q. It is a fact, isn't it, as you recall, this occasion when Senator was advised of these two complaints, was the only one upon which he was advised of any complaints having been lodged against the company? A. That is my recollection of the matter.

Q. At any of these interviews between Senator Burton and yourself prior to the indictment, did he indicate to you that he would not undertake to appear in the Department as against the United States? A. He did.

Q. Are you able to recall on which occasion that occurred? A. Why, I cannot with any certainty. The senator told me that several times.

Q. Disclaimed, whenever the occasion arose, didn't

he, any purpose or intention to appear there against the United States ? A. I think he did ; yes, sir.

Q. Do you recall his having indicated that, so far from desiring to appear as against the United States, if an occasion arose when summary action was necessary, that he did not even ask to be notified with reference to it ? A. No, sir ; I cannot quite recall that. He did say, however, that he would not antagonize the department, no matter whether he thought they were right or wrong or not ; that even if he thought the position taken by the department were wrong, even then he would not oppose them.

Q. This wrapper shows that on the 8th of November, 1902, a complaint was filed by F. R. Fravel ; that fact was not called to the attention of Senator Burton, to your knowledge, was it ? A. I do not think so. If I might explain how the information was probably secured ?

Q. Yes, certainly. A. Instead of going down to the record myself, I probably asked my secretary to go and see whether there was a case, and get the names of the complainants, and he probably would simply take down those on whose complaints the case was made up.

Q. What I want to get at is the fact whether or not these complaints, other than those of the two Albany women, were called to the attention of the Senator ? A. My best judgment would be that they were not. I have no recollection of that.

Q. And that would cover the complaint of Arthur M. Allen, of January 5, 1903, and S. A. Warner, that is, the Pittsfield lady, of January 21, 1903 ; those are all that have been introduced here. That would cover all of those ? A. Yes, sir."

RE-DIRECT EXAMINATION BY COL. DYER :

Q. On this talk that you had with him, in which he said he would not antagonize the department, how many times was that repeated to you, that he would not antagonize the department ? A. You mean on how many different occasions ?

Q. Yes. A. Well, I should say possibly three times.

Q. I do not know that you answered fully in your first inquiry, on your direct examination, and I will ask the question now : What statements, if any, other than those you have already given, did he make in reference to Major Dennis, and the character of the man ? A. I cannot recall any particular statements

that he made with reference to him, except those in connection with Mr. Brooks.

Q. What did he say to you in reference to the character of Dennis, if anything? A. He said Dennis was all right, and was trying to do a straight business."

The testimony of Senator Burton is positive as to his movements prior to his coming to Washington, and is wholly uncontradicted, and excludes the hypothesis that he could have had any interview with Cochran before the 20th of November. Of course, it will be observed that Cochran is uncertain as to that fact, but Senator Burton's testimony makes it clear that Cochran must have been mistaken.

Senator Burton's testimony upon the head of this first interview is as follows (p. 216 of the Record):

"Q. How soon after that interview [with Harlan on the train, Nov. 17] did you reach Washington?

A. I reached Washington on the 19th day of November.

Q. When, before that, had you last been in Washington?

A. I left Washington on the 5th day of July, of that same year, and spoke in Topeka, Kansas, on the 7th; sailed for the Sandwich Islands on the 14th of August, returning and landing in San Francisco on the 6th of October; went into the campaign, and from the time I left Washington on the 5th of July, I was not back there any more until the 19th day of November.

Q. Now, you have heard the statement of Mr. Cochran, with reference to the earliest of your calls at his office. What was your recollection in regard to that? A. I called there first on the 20th day of November.

Q. Had you been there previously to that at any time between the time when you left Washington at the close of the session and the occasion of this visit that you indicate? A. I had not. I had not even been in the city.

Q. State what occurred—or, in the first place, for what purpose or for what purposes did you go to the Post Office Department on the 20th of November? A. I had received a letter from Mr. Harlan——

Q. Pardon me, is this the letter, the one of the 18th of November?

A. Yes, sir. That is—no, sir; this is not the original.

Q. The letter of which that is a copy? A. I take it that is a copy, without reading it all over.

Q. Here is the original? A. (Referring to paper.) Yes, that is the letter.

Q. Now, you had received that letter? A. Yes, sir.

Q. On receipt of it, what did you do? A. I went to Mr. Cochran's office.

Q. What inquiry did you make, as you recall? A. I asked him if he had any information—I cannot remember the exact words, but whether he knew if Mr. Dennis had been indicted, or if it had been determined to indict him, and said to him, 'If he is indicted I expect to help defend him.' And I think his answer was that he knew nothing about it.

Q. Now, in what connection was any information afforded you in regard to this so-called complaint of Mrs. Evans or Mrs. Hout? A. I cannot remember the exact words, or how we got at the subject, but to the best of my recollection I explained to Mr. Cochran that Mr. Dennis owned the Rialto Grain & Securities Company, and I asked him if there were any complaints—if he knew anything about that company—was my first question, and he said he did not know anything about the company; and I asked him if there were any complaints against the company.

Q. Right there, Senator, what was your purpose in making that inquiry of Cochran with reference to any complaints concerning the Rialto Grain and Securities Company; state to the jury what your purpose in that respect was? A. I had been employed as counsel for the company. Then I had this letter from Mr. Harlan (referring to the letter of Nov. 18) telling me that the tentative employment he had made with me had been ratified by the company. I had been advised that Maj. Dennis had had trouble with the Brook Brokerage company. As I say, I went there to ask about that. Both Mr. Kastor and Mr. Harlan had assured me that whatever irregularities there were in that company, it was not the fault of Maj. Dennis. I knew Judge Krum and Mr. Harlan were the attorneys of this company, but being advised that far, I wanted to satisfy myself with respect to the standing of this company in the department. That was the motive of the inquiry.

Q. In response to your inquiry about complaints, what did you receive from Mr. Cochran? A. Mr. Cochran was sitting, as I remember it, next to the window. His room is rather a long, narrow one. He got up and went across to the fore part of the room, if I recollect rightly, and looked at a record, and came back and said to me that there had been two complaints made or filed 'last month,' as I understood him, and that they had been sent out to the inspector in charge at St. Louis, and he gave me the names of Bella Evans and Mrs. Hout, of Albany, New York, and I made that little entry there at the time.

Q. At the time of the interview between Mr. Harlan and yourself, in which the details of your employment were arranged, was there any indication given you that there had been any complaint made against the Rialto Grain and Securities Company? A. No, sir, Mr. Harlan said to me that there was absolutely nothing against the company, and he said, 'if you do not believe it, go and inquire yourself.'

Q. So is it a fact that it was on this occasion that you first learned there was any such thing as a complaint against the company? A. Yes, sir.

Q. Did you see the Evans letter? A. No, sir, I did not, and I did not ask to see them.

Q. Was the interview between yourself and Mr. Cochran limited to this—or did anything further take place, as you recall? A. I had previously told Mr. Cochran, as I stated, that if Maj. Dennis was indicted in the other matter that I expected to help defend him, and then I said to him: 'Now, Cochran, I am the counsel for the Rialto Grain and Securities Company. Major Dennis owns the company. He is a stranger to me. I have been assured that the company is organized and its methods are all right. But I do not know, and if anything comes into the department that puts you upon inquiry, any complaints or anything of the kind, I wish you would advise me, because, notwithstanding I am counsel for the company, I am not its counsel here. I cannot be retained under any circumstances to appear in the department as a paid attorney.'

Q. Now, Senator, at that time did you— A. But there is one more expression I omitted there. I said 'Another thing, Mr. Cochran, in case that it should become necessary to recommend summary action on any complaint, disregard my request entirely; because I won't answer any of these complaints, and I won't

remain attorney of the company or counsel for the company if it has any trouble with the department.'

Q. On that occasion, Senator, did you, by any word you recall, or anything you did, indicate to Mr. Cochran any purpose on your part to interfere in any way with any of the processes of the Post Office department, or lead him—did you on that occasion attempt to lead him to withhold or abstain from any action that might be found necessary on his part, or on the part of any other officer in the department?

A. Not at all.

Q. Have you now substantially given us what occurred on this first occasion? A. Yes, as I remember it."

Record, page 219:

"Q. The letter of Mr. Harlan? A. Yes, the letter of Harlan. Going back a moment, Judge, and looking at this letter of November 20, I think there was some talk between Mr. Cochran and myself, I cannot remember the words, about the custom of hearings on complaints; that is, if complaints were made, unless it was a very aggravated case or required summary action, the parties were always notified and always heard.

Q. That was on the occasion of this first talk you had with him?

A. Yes, sir."

Record, page 220:

"Q. It appears from the evidence here, that even earlier than the 18th of November there had been filed a complaint, as it is called, of F. R. Fravel. Do you recall any information given to you with reference to any such complaint, on the occasion of your first visit? A. I never heard that there was any complaint against the Rialto Grain and Securities company until after I was indicted, except these two first that were mentioned to me on my first visit.

Q. That will cover the whole thing, Senator. When did you go, if at all, to the office.

A. I want to add, if you will allow me, that when I got Mr. Harlan's letter telling me those two cases had been examined and reported nothing in them, or substantially that, I never gave the matter another thought. And speaking in regard to these jackets, I

never heard of a jacket until Col. Dyer commenced speaking of it the other day, except once, and that is since I have been indicted, and when I was trying to find out in Washington if there were any other complaints against this company."

The foregoing testimony of Senator Burton is in substance and effect corroborated by Cochran and is totally uncontradicted in this case. No attempt was made to contradict or disprove it.

The foregoing testimony of Senator Burton if true is a complete defense, because it was through Cochran and Cochran only that Burton is charged with having committed the offense. Cochran was present as the Government's witness at the trial, and though present at the trial he was not called to rebut or contradict the testimony of Senator Burton above given, and nothing that Cochran said in his examination-in-chief contradicts it, but directly supports it. It appears on page 94 of the record that Senator Burton immediately upon and as a result of this interview wrote a letter to Harlan, which letter and its contents, having as it does sole reference to this interview, will be discussed in another part of this brief (p. 98). Suffice it to say here that this letter shows conclusively that the two complaints above adverted to of Hout and Evans were all that Burton heard of at that first interview (or any other prior to his indictment), and that he promptly advised Harlan with reference to it and indicated to him that they should receive immediate attention and that he had arranged that he should be notified if any further complaints were filed, and that the department would grant them a hearing. It appears further that these two complaints were, as Senator Burton testified, eliminated from his further thought and consideration by the reply promptly received to that letter, which is to be found on pages 175–6 of the record. For the convenience of the Court and as bearing strongly upon the main question involved in this prosecution, we quote this letter in full :

" Nov. 22, 1902.

HON. J. R. BURTON,
C/o Senate Chamber,
Washington, D. C.

MY DEAR SIR—We have your favor of recent date, [Nov. 20, p. 94] and contents noted. The claims that you referred to against the Rialto Grain & Securities Company, have been investigated by a Post Office Inspector connected with this Department, and he found the actions of our company to be all right, and, we are informed, made a report in favor of our Company relative to the same.

I now contemplate leaving here Monday night for Washington, and should, in due course, arrive there on Wednesday morning, and some time during Wednesday will take the liberty of calling upon you if convenient to you.

Everything is running very nicely here, but as I hope to see you within a few days, I will wait until then to explain some matters that have come up since my last communication.

I enclose the Company's check for $500, as per agreement. This check should have been sent in my former communication, but I neglected to do so.

Hoping that I shall have the pleasure of a personal interview at an early date, I remain,

Yours very truly,
THOS. B. HARLAN."

It might be further added that the testimony of Cochran (p. 148) and Burton (p. 220) both clearly and fully coincide in establishing the fact that these are the only two complaints that Burton ever heard of during the period of his employment and down to the date of the indictment. And it will be noted further in the letter just quoted that his mind, if he had any interest in them, which he disclaims, must have been absolutely set at rest by the information conveyed in the reply of Harlan to his letter.

This first visit of November 20 is not included in the indictment (which alleges no services by Burton prior to November 22), but if it were, the visit was lawful and proper, and does not prove or tend to prove the charge as alleged in the indictment, to wit, the render-

ing of services with a view to prevent the issue of a "fraud order." On the contrary it disproves so far as it goes any such charge.

B.

The second visit of Senator Burton to the Department, December 9, 1902.

Re Bowman and Shove, Bogus P. O. Inspectors.

This took place on the 9th of December, 1902, as testified to by Senator Burton (p. 219). Cochran cannot recollect the date, but the memory of Senator Burton in that behalf is nowhere disputed and the certainty of the date is fixed by correspondence and other circumstances in the case to which we shall presently advert. Respecting this visit, Cochran testifies (page 140 of the Record):

"Q. After "you gave him this information as to the complaints of Hout and Evans, when and where did you next see him, if at all, in reference to the matter of the Rialto Grain and Securities Company? A. I saw him again at the department, but I could not fix the date, only he made an inquiry whether certain persons [Bowman and Shove] who claimed to be inspectors were inspectors, and I gave him the information that the persons whose names he gave me were not inspectors.

Q. Do you recollect whether in that inquiry a man by the name of Bowman was mentioned as one? A. I could not recollect that, from my own recollection.

Q. What was his inquiry and what did he say in reference to the matter, at the time he made this inquiry? A. Well, he wanted to know if such persons were inspectors and if they were investigating this case.

Q. Was that substantially *all* that occurred? A. I think so, yes, sir."

Senator Burton's testimony upon this visit is as follows (p. 219):

"Q. When, Senator, did you go to the Post Office department the second time? A. Well, with reference to what, Judge?

Q. I mean with reference to any of these matters that have been inquired of here? A. I do not remember the date.

Q. Is there anything in any of these letters that will assist you in that direction? A. I have no independent recollection of the date, but the letter is on the 9th of December.

Q. It was of course before the 9th of December, the letter having been written on that date, that you went there? A. Yes, sir.

Q. To which office did you go? A. I went to Mr. Cochran's office, and my recollection is, showed him that letter of, I think it is December 3rd (Record, p. 137).

Q. The letter of Mr. Harlan? A. Yes, sir, the letter of Mr. Harlan."

* * * * * *

Q. Now, with reference to that letter of the 9th of December (p. 136), about when was it you went to the office of Mr. Cochran?

A. Well, I can only give my best recollection that it was on the 9th.

Q. With reference to what did you go there then? A. Hand me that bunch of letters, or give me the letter of Dec. 3rd.

Q. This is the one, signed by Harlan? A. Yes. When I received this letter, the next time I was at the office, in making the rounds of departmental calls some weeks afterwards, I suppose it was, my recollection is that I showed Mr. Cochran this letter, and I did it for the purpose of advising him with reference to this man whom Harlan thought was a fraud or the men. Mr. Cochran said at once 'there is no such inspector as Bowman;' that he would like to catch him, and spoke about the other man being a fraud, and I think he then said, 'There is nothing in this office here against this company in any shape, manner, or form, or no instructions gone out,' or something, I don't remember. I could only infer from my letter.

Q. Your best recollection, then, is that this call at the office of Cochran was on the 9th of December? A. That is my recollection.

Q. Did you have any other purpose in going there, or did you indicate to him any other purpose on your part in going there than to inquire with reference to two persons named in this letter? A. Nothing at all. And if there is any other statement made, it was volunteered, that was the purpose of my inquiry, and I was there for a moment. I remember very well being there, but, as I say, I cannot say positively it was the ninth."

Cochran was not recalled by the Government on this subject, and the foregoing is *all* the testimony as to this second visit.

It appears, therefore, from this testimony, which is uncontradicted, that this second visit was occasioned alone by the letter of Harlan to Senator Burton of date December 3, 1902, found on pages 137-8 of the record relating to two bogus Post-office Inspectors named Bowman and Shove. The substance of this letter was to the effect that certain individuals, Bowman and Shove, were claiming to be Post-office Inspectors, and were annoying and demanding inspection of the affairs of the Rialto Grain and Securities Company, and that Harlan was of opinion that they were fraudulently representing themselves to be United States officers, and the visit of Senator Burton to the department was solely to determine this question. Burton's answer to this letter, dated December 9th, is on page 136 of the record, and conveys the information that he obtained from Cochran upon this subject. The other matters contained in the letter, and the general purport of the letter and its relationship to the inquiry before the Court will be discussed in another part of this brief *(post,* p. 104).

The purpose of this visit was lawful and proper and the defendant said or did nothing proving or tending to prove the charge alleged in the indictment, to wit, to prevent the issue of a "fraud order." On the contrary, it negatives so far as it goes any such charge.

C.

The third visit of Senator Burton to the department, December 15, 1902.

CASUAL CALL *re* DENNIS INDICTMENT.

By reference to page 140 of the record it will be seen that there was a little confusion in the mind of Cochran in his testimony as to what was the occasion of the third visit of Senator Burton, but he is straightened out by his counsel on page 141, and Cochran testifies as to that third visit as follows:

"Q. May I refresh you a little on that, probably, by asking you this question: Did you see him at the department in company with Maj. Dennis in December before? A. Yes, sir, I did.

Q. Now, you may state, have you any definite recollection as to the date of that visit? A. Only the nearest approach I could make to the date was that it was after the indictment and the arrest of the officers of the Rialto Grain and Securities Company.

Judge KRUM: Q. You mean of the Brooks Brokerage Company?

COL. DYER: Q. Including Maj. Dennis? A. Yes, sir.

Q. Will you state to the jury what he said to you at that time and upon that occasion? A. Well, he said first that he wanted me to see Maj. Dennis and see what kind of looking man he was, and he repeated the assurance that his company was endeavoring to do a straight business, and also the former statement that all the troubles arose from the conduct of the Brooks Brokerage and Commission Company.

Q. Was that the first time you ever had seen Maj. Dennis?

A. Yes, sir.

Q. Were you introduced to him by the Senator? A. I was.

Q. Now, what else was said in that interview, if anything?

A. I do not recall anything, except the general statement that they did not wish to antagonize the department, and that they wanted to do just exactly as the department wanted them to do.

Q. In what respect, did they say? A. In the conduct of the business of the company.

Q. Was there anything said in reference to conforming to the rules of the department as to the kind of literature that should be sent out through the mails at that time? A. No, sir, I do not recall any such statement."

Cochran, on cross-examination (p. 148), testifies he "cannot recall any particular statements that he [Burton] made with reference to him [Dennis] except those in connection with Mr. Brooks" the visit related to the Brooks matter.

The indictment referred to in this testimony was the indictment that was feared by Dennis and the Rialto people at the time of Burton's employment. The Brooks Brokerage Company had been purchased and taken over by Dennis and the new company, the Rialto Grain and Securities Company formed. The indictment in question had no relation to the Rialto Grain and Securities Company (pp. 204–209) but was wholly confined to the operation of the Brooks Brokerage Company and Major Dennis was involved in this indictment solely by reason of his purchase of the business of that company, and as it afterwards appears by this record was tried and acquitted of any offense by reason of the fact that he had no relation whatever to the matters charged in the indictment (Verdict, p. 210.)

Senator Burton's testimony with reference to this third interview is to be found on page 220 and is as follows:

"Q. When after the 9th of December, did you go to the office of the chief inspector? A. I called there with Maj. Dennis on the 15th day of December.

Q. What was your purpose in going there at that time? A. Maj. Dennis had come on to Washington and brought a copy of his indictment, and a statement of the facts, or purported facts, prepared by yourself and Mr. Harlan. I had spent the evening with him before, and the forenoon of the 15th, and had given him my opinion respecting the case, upon the facts stated. We took a carriage and drove to my office from the New Willard hotel. Maj. Dennis was urging me, after

I gave him the opinion, to come back to St. Louis with him. I tried to dissuade him; that it was not necessary—shall I tell what was said there?

Q. No, it is not necessary to go into that at all. A. After we got there Maj. Dennis wanted to make a draft—

COL. DYER: I don't know what we have to do with all those particulars.

JUDGE KRUM: Q. Come to the interview in the office.

A. We were driving by the office and I suggested that we make a call on the 4th Assistant Post Master General merely to pay our respects.

Q. Did you go to his office? A. We went to his office; he was not in; we waited a few minutes and then we left his office and went down the winding stairway there. I suggested that we go down that way and make a call at Mr. Cochran's office.

Q. What occurred at Mr. Cochran's office? A. I think it is about as he told it.

Q. You introduced Maj. Dennis to him? A. Yes, I introduced Dennis and I heard some talk there about Dennis' middle name being Cochran, and they talked about family matters.

Q. Your recollection of what occurred is substantially as Mr. Cochran indicated? A. Well, sir, I don't remember anything different, unless it was, unless I said something about being Maj. Dennis' attorney.

Q. Unless it is materially different, it is not necessary. A. As he gave it, it is substantially correct.

Q. On that occasion, Senator, did you ever have any other purpose in going to Mr. Cochran's office than to merely present Maj. Dennis? A. No, sir, we were driving back from my office to the bank."

The purpose of this visit was lawful and the defendant said or did nothing tending to prove the charge alleged in the indictment, to wit, to prevent the issue of a "fraud order." In fact, Burton had no knowledge that any complaint against the Rialto Company was before the Department for its action or decision. (On this point of want of such knowledge see *infra*, p. 84.)

D.

The fourth visit of Senator Burton to the Department, January 24, 1903.

RE THE BOOKS, OF THE BROOKS BROKERAGE COMPANY.

Before the fourth visit of the Senator to the Department the indictment against Dennis had been tried in the Federal Court at St. Louis and he had been acquitted on January 20, 1903 (p. 210). In that case Dennis had voluntarily offered to produce and did produce for the use of the government the books of the Brooks Brokerage Company. These books, however, were the property of Dennis, because he had purchased the business of the Brooks Brokerage Company and he was entitled to them for his protection against Brooks and for such legitimate uses as he might have for them, provided the government was through with them. The inspector in charge, Mr. Dice, was at that time threatening to turn these books over to the *State* authorities. Of course it was claimed by Dennis and admitted by the Department that Mr. Dice had no right to do this, but that it was Dice's duty when through with them to turn them over to the owner [Major Dennis], although the evidence shows that Major Dennis was ready and willing to allow the government to retain them for any future use that it might have for them.

Respecting this visit, Cochran testifies (p. 141 of the Record) as follows:

"Q. When after that did you see him [Burton] next? A. About the 24th of January, 1903.

Q. State where you saw him then? A. At my office in the department.

Q. What occurred at that time, and what was said? A. He stated that Mr. Dice had taken a book or the record that had been turned over to him in the investigation of the case in the United States Court, and that after that case had been thrown out, he was taking

them over to the State courts for use here. And he said that those records had been surrendered voluntarily and it was a breach of faith on the part of Mr. Dice to make that use of them. And he asked that Mr. Dice be ordered to return the books.

Q. What was said by you and him any further? A. I told him that Mr. Harlan who was the person who wanted the books back should see the United States attorney and Mr. Dice would be governed entirely by whatever instructions he might give. But the Senator insisted that something ought to be done about the matter, and at my suggestion we went to see the 4th Assistant Post Master General, and the case was stated to him.

Q. State what occurred between the 4th Assistant Post Master General and Mr. Burton and yourself on that occasion when you got there? A. There was practically the same statement that was made to me and the same request; that Mr. Dice be ordered to return the books.

Judge Krum: Q. These were the books of the Brooks Brokerage and Commission Company, weren't they? A. I think so. Of course, I never saw them. But it was a book that had been surrendered to Mr. Dice, in the investigation that he made.

Judge Krum: That is a fact, isn't it, Col. Dyer, that it was a book of the Brooks Brokerage Company?

Col. Dyer: That is true.

Q. What was further said by the 4th Assistant Post Master General? A. The 4th Assistant Post Master General also declined to say that the order would be given. Then, my recollection is, we all three went to the Post Master General, and the case was submitted to him. The Post Master General, after considering the matter, directed me to send a telegram to Mr. Dice.

Q. After the conversation had with Senator Burton and yourself and the 4th Assistant Post Master General? A. Yes, sir.

Q. I show you a message and ask you whether that is the message that was sent to Mr. Dice after your visit to the Post Master General in company with Senator Burton? A. (After examining the paper.) It is.

Q. That is the dispatch you sent? A. Yes, sir, it is.

Q. According to the direction of the Post Master General after the visit and the conversation had there

in reference to this matter, between the 4th Assistant Post Master General, yourself, the Post Master General and Senator Burton? A. Yes, sir.

Q. This dispatch seems to have your name as the inspector; by whom was this dictated? A. By the Post Master General.

COL. DYER: I offer to read that dispatch.

JUDGE KRUM: It is obvious, your honor, that this telegram does not relate to any matter involved here, and accordingly we object to it.

COL. DYER: This shows, as has already been shown in the course of this trial and by these papers, that this matter of the trial of Dennis, was over long before this dispatch was sent, and it is offered for the purpose of showing the continuous relations that existed between this defendant and Dennis, who was the president of the Rialto Grain and Securities Company.

JUDGE KRUM: There is no dispute at all about that, but we submit that whatever occurred—Now, Mr. Cochran has explained what occurred in reference to these books. Your Honor has observed from the testimony they were the books of the Brooks Brokerage Company. What was contained in those books did not concern the Rialto Grain and Securities Company at all. The books were used in evidence here before your Honor, as your Honor recalls, and after the trial of Garland and Dennis, there was no further occasion for the further retention of those books by any of the officers of the Government, and this testimony merely goes to show that Mr. Burton, acting for the Rialto Company, if you please, as he undoubtedly did, sought to have those books returned to Maj. Dennis. Now, there was nothing done by the defendant in that regard which would involve any culpability with reference to the charge upon which the defendant is now on trial.

Objection sustained."

[NOTE: By the same reason, *all* this evidence was, like that telegram, utterly immaterial, and failed to prove or to tend to prove the charge in the indictment.]

Senator Burton testifies in regard to this matter on page 221 of the record as follows:

"Q. That was your purpose in going. Then when did you next go to the office? A. I think it was on the occasion of January 24. Let me see those

telegrams and I can tell you (referring to telegrams.) No, I haven't any. It was the occasion that he testified about when I went with reference to the records and books of the Brooks Brokerage Company.

Q. Was that all that was referred to or discussed on that occasion? A. Yes, sir, that was all. There was nothing else talked about.

Q. Was your purpose in going there limited to an inquiry or action in regard to the Brooks Brokerage Company? A. Entirely so, yes, sir."

This testimony was irrelevant, and ought to have been excluded from the jury. It was wholly foreign to the alleged offense. The visit was lawful and proper. What Burton said did not prove, or even tend to prove, the charges of the indictment, to wit, to prevent the issue of a "fraud order."

E.

The Fifth and last interview with Cochran at Senator Burton's office, February 5, 1903.

ALSO RE THE BOOKS OF THE BROOKS BROKERAGE COMPANY.

The purpose of the last interview of Senator Burton with Cochran, on February 5, 1903, was the same as that of the fourth interview; namely, with reference to the books of the Brooks Brokerage Company retained by Dice, and was occasioned by a telegram of that date, February 5, 1903, from Harlan to Burton, to the effect that Dice had carried out his threat and had actually turned over the books to the State authorities (p. 222). This telegram (p. 222 text) is quoted and referred to in this brief, *(infra*, p. 106).

Cochran's testimony with regard to this interview is as follows (p. 143 of the Record):

"COL. DYER: Q. When, after that visit to the Post-Master General, did you next see Senator Burton? A. On the evening of the 5th of February, 1903.

Q. Where did you see him? A. At his office in the Senate Annex, in the Maltby Building.

Q. How did you come to meet the Senator there? A. The Senator's secretary, Col. Smith, telephoned me in the course of the afternoon, saying that the Senator would like to see me, and asked if I would not call at his office on my way home. The Maltby Building is about half way between the Department and my house, and I did call on him.

Q. Will you state, as nearly as you can, all that was said on that occasion in reference to the Rialto Grain and Securities Company? A. The Senator either showed or read me a telegram from Mr. Harlan, stating that they had not got possession of this book or books, and that Col. Dyer had stated he had no further use for them, and the Senator again said that if that was the case they ought to be returned, that Mr. Dice was acting in bad faith in insisting upon keeping the books. I promised to send a telegram of inquiry the next morning, and I did send one.

Q. What else occurred in that interview? A. After that matter was settled, the Senator said to me, 'Cochran, I want to appear in this and other cases before the Department, but I want it understood that in so doing I shall never antagonize the Department, and my efforts shall rather be used the other way.' He said he could make some money in that way and apply it on old debts. That he had lost very heavily during the panic and that he had paid in—I cannot tell exactly in what time, but my recollection is during his time as Senator—$70,000 on which he was not legally liable, but that if there was any just claim against him he would never plead the statute as a defense.

Q. What else was said there in that conversation? A. He said there was not anything wrong about this. That a number of senators, notably Senator Edmunds, had very materially increased his income by such practice and that it was all right.

Q. Was that substantially all that took place there at that time? A. Nearly all, I think so.

Q. What, if anything, was said by him in that conversation with you, that when he overstepped the

bounds, what was to be done? A. He asked me to warn him.

Q. What case, or cases, did he say he would like to represent before the Department? A. Well, he said in this and other cases. The case we had been discussing was that of the Rialto Grain and Securities Company, as I understood it.

Q. Did he mention any other case in which he would like to appear? A. No, sir.

Q. After that time, did you have any further meeting or conversation with him in reference to the Rialto Grain and Securities Company? A. I do not recall any other until after the indictment was returned against the Senator."

On page 145 of the record, on cross-examination, he testified further as follows:

"By Judge Krum:

Q. This last interview before the indictment was, as I understand you, in February? A. February, 1903.

Q. And on what date in February? A. The 5th.

Q. That was the first time, wasn't it, that Senator Burton made the inquiry of you of the description you have given here? That is, the first time that the subject of his representing or appearing for the Rialto Grain and Securities Company was mentioned? A. Yes, sir.

Q. And that was the only time, was it? A. Yes, sir, the only time—well, except the last.

Q. I mean before the indictment? A. Yes, sir."

Senator Burton's version of this interview is to be found beginning on page 221 of the record and is as follows:

"Q. Now, when did you go to the office of Cochran again? A. With reference to the Rialto Grain and Securities Company? Or any matter connected with it?

Q. Yes. A. I don't think—I do not now recall that I was ever there again, although I would not be positive about that, Judge. I have tried to think of these matters as carefully as I could, but departmental calls are so many and varied that it is very hard to do it.

Q. On the occasion of the 5th of February, where did that interview take place? A. At my office—if you will give me those letters and telegrams, I can tell

you. (Referring to papers.) I received this telegram; I do not remember whether it is in evidence or not.

JUDGE KRUM: In connection with the Senator's testimony, I will read the telegram, dated St. Louis, Feb. 5, 1903, addressed to J. R. Burton. Which telegram is in words and figures as follows, to wit: (Counsel reads:)

"FEB. 5, 1903, ST. LOUIS, MO.

TO THE HONORABLE J. R. BURTON,
Senate Annex, Washington, D. C.

Dice delivered our books to state authorities, where they are held subject to his order. Get order requiring him to deliver to us. Col. Dyer told me he had no further use for them." [Signed by Harlan, p. 143.]

Q. Now, to what books did that telegram refer? A. To the same books and records.

Q. Do you mean the books of the Brooks Brokerage Company? A. Yes, sir. They were books that I had been advised had been voluntarily turned over to the authorities in the trial of Maj. Dennis.

Q. How did Mr. Cochran happen to visit your office, Senator? A. Just as he detailed. I asked Col. Smith, my secretary, to invite him there, and whether he 'phoned or went I do not remember.

Q. With reference to that interview, has Mr. Cochran substantially stated all that occurred? A. Well, he stated something of it, but he didn't state it substantially. I think he was very much mistaken in one part of it.

Q. With reference to that part, what part was it? A. I showed him this telegram, and he expressed surprise at that part of it which said, 'Col. Dyer told me he had no further use for them,' and said he would look into the matter at once. I told him that I knew nothing about the matter further than he did, but that, if Mr. Dice or Col. Dyer or the Government, or anybody connected with the Government, wanted to keep these books, there was no objection, as far as I knew, and, if there was, I would not urge any objection. But, unless he could give me some reason why they should be turned over to the State authorities, it would seem that that was not fair and right. He said he would look into it. We then branched off to something of a personal talk, as I remember. Mr. Cochran is from my

State, and I knew that he knew my history. I talked to him about being counsel for this company. I cannot remember just what I said, but reiterated what I had said to him in the first instance—I am a little ahead there. I told him the employment had come to me, and I was very glad to get it—

Q. He went over those matters, Senator, and I do not think it is necessary for you to do so. A. I want to call especial attention to one part of the conversation.

Q. I was going to call your attention to that myself. As I recall it, Cochran stated you made some remark about a desire to practice in the department, or to establish a practice in the department. I will get you to indicate to the jury whether that is the remark you made, or, if it is not, what you did say. A. Oh, no.

Q. There is no occasion to consume time with much detail about it, but just let the jury understand generally what your recollection about that is. A. I called attention to the fact that men like Senators Edmunds and Conkling had built up a good practice while they were senators, in the courts and as counsel—and, in a small way, I wanted to imitate them—because he knew my financial condition; that in the panic, and the long years after that had followed, I had lost my fortune; and I said, 'Now, Cochran, I am counsel for the company—for a company that had to do with the mails—and I want you to be particular and advise me if you see at any time any wrongdoing on the part of that company. Notwithstanding I am not the conservator of the morals of my client, I cannot afford and will not be their counsel if they have any trouble with the department.

Q. The important part is your seeking to establish a practice in the department. Did you ever, at any time, undertake anything of that kind? A. Not for one moment, at any time since I have been senator."

This visit has no relation to any fraud order—not the slightest. The testimony ought to have been excluded from the jury.

The purpose of this visit was lawful and proper, and the defendant did or said or sought nothing in respect of the issue of a fraud order, as alleged in the indictment.

The Inconsequential Supplemental Talk.

The supplemental talk narrated by Cochran at this fifth and last interview is the only hint or suggestion to be found in the entire body of this proof that Senator Burton ever had entertained, directly or remotely, a purpose to appear before the department in this or any other case for which he received compensation as counsel.

Relative to this personal talk between Burton and Cochran on this occasion after the business for which the meeting had been made "had been settled," it should be borne in mind, first, Burton up to that time never heard of any complaints that had been filed against the Rialto Grain and Securities Company, except the two of Hout and Evans. As long back as November 22, in the letter from Harlan, he had been notified that those complaints had been investigated by an inspector, who had reported there was nothing in them. On December 9th, Burton was told at the Post-office Department that "there is nothing in this office against you [that is, the Rialto Company] at this time" (Record, page 136). And Burton knew of nothing (page 220). And Cochran admits on his cross-examination (page 148, top) that "no complaints other than those of the two Albany women [Hout and Evans] were ever called to the attention of the Senator." Therefore, there was absolutely nothing pending in the department, so far as Burton knew, against the Rialto Grain and Securities Company, requiring any service or any attendance or any appearance of any kind or character upon his part before the department. Is it not plain, then, that Cochran's version of this conversation is wrong and that Burton's version is right? He was the general counsel of the Company; it did have to do with the mails. He would not look to an inspector to advise him respecting the ethics of his profession, but he would look to an inspector, a man from his own State,

to advise him if complaints were filed against that Company, or if he saw any evidences that the Company was violating the rules of the department in any shape, manner or form; in which event, he would sever his connection with the Company if it had any trouble with the department.

But even if it be assumed that Cochran was not mistaken and that Senator Burton said exactly what Cochran states, to wit (Record, page 143): "I want to appear in this and other cases before the Department, but I want it understood that in so doing I shall never antagonize the Department and my efforts shall rather be used the other way"; the question arises what is meant by the words "in this and other cases before the Department." Obviously these words refer to the "case" with which Senator Burton was then dealing, namely, the effort to get back the books of the Brooks Brokerage Company. That was the matter which was then under consideration, and the *only* matter, and it was perfectly proper and lawful for Senator Burton to appear in that matter, it being one in which the United States was not directly or indirectly interested in any way whatsoever. Bear in mind in this connection that, so far as Senator Burton knew, the only matters which had come before the Department were the Hout and Evans complaints, and that he had been advised expressly that these complaints had been disposed of; and bear in mind further that Senator Burton, on Cochran's own testimony (Record, page 148), knew nothing whatsoever of any other complaints (Record, pages 147, 148) (see Burton's Testimony, page 220, to the same effect). Senator Burton knew nothing whatsoever about any alleged "case" pending before the Department, which was made up of the various complaints which Cochran testified were put into a jacket and dignified by the name of "case," etc.; all this Senator Burton knew nothing about until after the indictment.

Bearing all this in mind, it will be seen that even if Cochran's testimony is to be given full credence, and

Burton's testimony disregarded, it means only that Burton says, "I want to appear in this (the Brooks Brokerage books case) and other cases before the Department." That is neither any offense charged in the indictment, nor any other offense under the laws of the United States. And even if it referred to any case in which the United States had an interest, it is only the expression of a desire and is not any admission of anything, and is not any admission that he *had rendered* any services prohibited by Section 1782, or otherwise. The fact that Senator Burton mentioned the name of Senator Edmunds (as Cochran testifies), or that he mentioned the names of both Edmunds and Conkling (as Senator Burton testifies he did), shows that Burton had no idea of doing anything except following their example, and had no idea of rendering any improper services, and in all probability whatever was said on that subject related to general law practice, such as Senator Edmunds and Senator Conkling engaged in in addition to their duties as Senators.

This talk is we repeat no "service," and no offense and no admission of any offense, but the reverse, and is wholly immaterial as to anything charged in the indictment.

Moreover, it must be borne in mind in determining the question of Burton's relationship to the department with reference to these two so-called pending complaints that so far as the evidence shows nothing ever came of them; they were dropped, obliterated, after the 14th day of November, 1902, and before Burton's employment—at least up to long after he ceased his connection with the Company, and that no effort was then made, or has since been made, so far as Burton knows or so far as this record discloses, to proceed in the department against the Rialto Grain and Securities Company or to base a fraud order upon them.

We need hardly suggest to the Court that the statements of Mr. Cochran in this interview as to the desire and purpose of Mr. Burton would even, if true, not be

competent testimony in this case. He is being tried for his acts, for what he did, and not for what he said he would like to do. And this is not left to conjecture. The concluding statement of Senator Burton in his examination in chief, appearing upon page 223 of the record, is, so far as this record goes, the truth and nothing but the truth, and is wholly uncontradicted, and we herewith append it. In answer to a question of his counsel, he testifies as follows:

"Q. I will get you to indicate to the jury whether, at any time, either to Mr. Cochran, as chief inspector, of the Post-Office Department to the Postmaster General, to the 4th Assistant Postmaster General, or to the Assistant Attorney General for the Post-Office Department, you ever said anything or ever did anything in the presence of either of them, or indicate a purpose on your part, to influence them at all with reference to any proposed action in regard to the Rialto Grain and Securities Company in that department? A. Absolutely none whatever—and I do not think any officer of the Government would say so."

And none has said so.

Certainly, the only witness whom they had produced has not only not said so, but has in answer to questions propounded by the prosecuting attorney and by Burton's counsel, again and again reiterated that Burton did not seek to and did not influence him.

The foregoing is the testimony in full relating to every visit of Burton to the Department. It shows affirmatively that the charge that Burton tried to prevent the issue of a fraud order is not true.

There is a total absence of any testimony even tending to show that anything Burton said or did either directly or indirectly had or was intended to have the smallest influence upon the action of any officer of the Post-Office Department with reference to any matter or

thing pending before the department in relation to the issue of a fraud order as alleged in the indictment. On the contrary the testimony disproves the truth of the charge made in the indictment. Thus, Government witness Cochran expressly testifies (Record, pp. 146, 147,) as follows:

"Q. At any time from the beginning of Senator Burton's indication to you that he had any connection with the Rialto Grain and Securities Company, there was no discussion between you and him [Burton], **was there, as to the issuance or non-issuance of a fraud order as it is called, against the Company? A. I think not.**

* * * * * *

"Q. I understand you, then, that you are not able to recall any occasion upon which the Senator made any representation to you or had any conversation with you with reference to the issuance of a fraud order? A. No, sir.

* * * * * *

"Q. There was no discussion between you was there, on this occasion, of the merits of the representations of Mrs. Evans or Mrs. Hout? A. No, sir.

* * * * * *

"Q. It is a fact, isn't it, as you recall, this occasion when senator was advised of these two complaints, was the only one upon which he was advised of any complaints having been lodged against the company? A. That is my recollection of the matter."

CERTAIN LETTERS AND TELEGRAMS were introduced by the Government and relied on in the trial to establish the charge laid in the indictment that Senator Burton rendered services in the P. O. Department to prevent the issue of a fraud order against the Rialto Company.

As demonstrating the truth of Cochran's statements just above quoted that Senator Burton never "made any representation or had any conversation or discus-

sion as to the issuance or non-issuance of a fraud order," and of Burton's testimony to the same effect (p. 223), and as showing that the Letters and Telegrams had no reference to a fraud order and related entirely to other matters wholly distinct from any fraud order inquiry, we proceed to show that the *defendant did not even know that any fraud order inquiry was "before" the Department or "pending" therein.*

After showing this we shall then refer to the letters and telegrams *seriatim* to show that they contain nothing to support the charge in the indictment.

The Defendant, During the Time of His Employment by the Rialto Grain and Securities Company, Did Not Even Know That Any Inquiry Was Before the Department, or Pending Therein, as to Whether the Postmaster General Should Issue a Fraud Order Against the Said Company, and He Never Rendered Any Service Having Any Reference Whatever to the Issuance of a Fraud Order.

That Senator Burton's services had nothing to do with any question of the issuance of a "fraud order" against the Rialto Grain and Securities Company is clearly shown by the chronology of the matter. The testimony of Cochran (Record, pp. 147, 148), as well as the testimony of Burton (Record, p. 220), was to the effect that the only complaints made in the Post-office Department against the Rialto Grain and Securities Company, of which Burton was informed or of which he had any knowledge, notice or information whatsoever at any time before his indictment, were the complaints of Hout and Evans.

Not until November 17, 1902 (Harlan's Testimony, Record, page 170), did the conference take place be-

tween Harlan and Burton on the train from St. Louis to Chicago, when the agreement was made for Burton's employment. The complaints of Hout and Evans were received in the Post-office Department at Washington on October 31, 1902, and November 1, 1902, respectively (Record, page 57). November 7, 1902, these complaints were referred to the Post-office Inspector in charge at St. Louis (Record, pages 64 and 65). Inspector Dice, the Post-office Inspector in charge of the St. Louis Division, testified (Record, page 69) that these complaints were received in his office November 10, 1902, and that on November 14, 1902, they were referred to local Post-office Inspector M. G. Price for investigation. Dice also testified (Record, page 70) that within a day or two afterwards Inspector Price made an oral report to him to the effect that "*the two complaints were not of such a character as to warrant action in the matter of the recommendation of a fraud order.*" Inspector Price testified (Record, page 202) that the complaints were turned over to him on November 14, and that he made inquiry and investigated the records of the Rialto Grain and Securities Company *that same day*, and that he returned the case to the office, and (page 203) that the investigation of the records satisfied *him that the complaints were not warranted.*

The facts were, therefore, that these complaints of Hout and Evans had been made in the Post-Office Department, had been investigated by that department, and a report had been made that there was nothing in them to warrant the issuance of a fraud order, and there the matter stood *before* Senator Burton was employed by the Rialto Grain and Securities Company. These complaints of Hout and Evans were not mentioned when Burton was employed (pp. 189, 220). They were the only complaints that Senator Burton ever knew of (Record, page 147, 148, 220). Burton's letter of November 20 (p. 94) shows that until that time he did not know of the Hout and Evans letters. And see Harlan's letter of

November 22 (p. 175). Also Burton's letter of December 9 (p. 136), and Cochran's evidence (pp. 146, 147, 148).

Furthermore, Cochran testified (Record, page 146) that he was

"*not able to recall any occasion upon which the Senator made any representation to him or had any conversation with him with reference to the issuance of a fraud order*" (Record, p. 146).

Burton had no conversation, conferences, or intercourse with any other officer of the Post Office Department except Cochran as to any matter charged in the indictment. Bear in mind that the allegation of the indictment is that the matter or thing which was pending before the Post-Office Department was whether (Record, page 5)

"the Postmaster General should order and direct the Postmaster at St. Louis, Missouri, not to deliver to the said Rialto Grain and Securities Company, but to return with the word 'Fraudulent' plainly written or stamped upon the outside (as authorized by Section 3929 and Section 4041 of the Revised Statutes of the United States, as amended by the Act of Congress of March 2, 1895) any and all letters addressed to said Rialto Grain and Securities Company, and sent to or through the post-office at St. Louis, Missouri, by means of the Post-office establish- of the United States."

It is also alleged that (page 5) the services rendered by Senator Burton were

"with a view and for the purpose of inducing said Postmaster-General, the said Chief Post Office Inspector, and said other officers, to decide the question so as aforesaid pending before said Post Office Department in a manner favorable to the said Rialto Grain and Securities Company."

Bear in mind, also, that the testimony of Inspector Cochran, with whom alone Senator Burton had the conferences or conversations in the Post-office Depart-

ment, was to the effect that there was *never any reference in the said conversations to the issuance of a fraud order* (Record, p. 146); and bear in mind, also, that before Senator Burton's employment the only complaints of which Senator Burton ever heard prior to his indictment, had *already been disposed of* as above shown; and it will readily be seen that there is absolutely nothing whatever in the evidence to support the allegations of the indictment that Senator Burton rendered any services whatever to the Rialto Grain and Securities Company before the Post-office Department in respect of the issuance of a fraud order against the Rialto Grain and Securities Company.

Moreover the alleged services all related to something else than the issue of a fraud order.

No "case" against the Rialto Grain & Securities Company was pending before the Post-Office Department. If any complaint was pending there against that company, Burton did not even know of it, much less appear there for the company.

In the testimony of Inspector Cochran (Record, page 73 *et seq.*, also page 139 *et seq.*) there is a great deal of talk by him and by Col. Dyer, the prosecuting attorney, about a "case" being made up by the Post-Office Department when the letters of Hout and Evans were received, and they speak about a "case" pending before the Post-Office Department, etc. An examination of the testimony shows that what they meant is that when somebody, as for example, Hout and Evans, writes a letter to the Post-Office Department, that then in order to keep their files straight, they put this letter in an envelope or box, which they call a "jacket," and that for convenience they call the matter a "case."

It goes without saying that this custom of the Post-Office Department in the keeping of its files cannot change the true nature of any matter which is before the Department. Stripped of all this artificial talk about "case" and "case pending," "jacket," etc., the facts as to what was done were these: When these letters of Hout and Evans came before the Post-Office Department they were sent by the Post-Office Department to St. Louis for investigation by Inspector Dice, the inspector in charge there, and he delegated Inspector Price, one of the inspectors under him, to investigate the matter and report to him. Price did investigate the matter and reported to him November 14, 1902, that there was nothing in the charge, and there the entire matter of the complaints of Evans and Hout, so far as the evidence in this record shows, ended.

Post-office Inspector Dice says (Record, p. 70): "They [the Hout and Evans complaints] may have been taken up in connection with a number of other complaints at the time of the investigation by Mr. Price and Mr. Piatt. That was in July and August, 1903."

Mark, the witness does not say they *were* taken up, but may have been. This was eight and one-half months after Burton's original employment, and four months after his employment by the Rialto Company had terminated, and four months and a half after the dates at which the indictment alleged Burton performed any services before the department. Neither Dice nor any other witness actually states that they were taken up again or that any investigation was had respecting them after the investigation made in November, 1902, and the report made November 14, 1902, that there was nothing in these two complaints. Without reflecting on Mr. Dice, it fully appears in this evidence that he was not partial to Major Dennis. Dice was the agent of the Post-office eDepartment and was aiding the Post-office Department in the prosecution of Dennis for his alleged connection with the Brooks Brokerage Com-

pany. After that prosecution was ended and Dennis acquitted, and when Dennis was clearly entitled to the books of the Brooks Brokerage Company and asked Dice to return them, Dice persistently refused to do so, but on the contrary turned the books over to the *State* authorities, and this at a time when the United States Government and the District Attorney said they were through with the books. Dice was informed of the report of November 14 in favor of the Rialto Company. The company was doing business in the same city where Dice resided. He knew that fact, and if he had not accepted the investigation and report of November 14 as satisfactory to him and as making an end of the matter he would have ordered a further investigation or further action in the matter.

The conclusion, then, is irresistible respecting the Hout and Evans complaints, that after Dice received the favorable report from Price on November 14, that he, Dice, considered that report satisfactory and that the matter was at an end.

It, therefore, appears from the facts and circumstances in this case not only that Senator Burton was informed and believed that the only two complaints of which he ever had any knowledge, Hout and Evans, had been investigated and disposed of before his employment, but that the officers of the Post Office Department had the same understanding.

This whole prosecution is based upon the fiction that the Hout and Evans complaints, thus disposed of, and understood to be disposed of on November 14, before Burton's employment, was nevertheless a matter pending in the department for its action during the whole period covered by Burton's employment, namely, from November 18, 1902, to March 26, 1903. There was no such inquiry pending, and, as we have shown, the subject matter of said fraud inquiry was never mentioned, as Mr. Cochran expressly testifies, by Senator Burton at any time during Senator Burton's employment. For it must be borne in mind that Burton's entire relation

to this matter is as if no other complaints had been made except the Hout and Evans.

The complaints of Evans and Hout were the only complaints before the Post-Office Department, with which the evidence at all connects Senator Burton (Cochran's Testimony, Record, pp. 147, 148); and his connection with those complaints was only this: that he was informed by the Post-Office Department when he called before the Post-Office Department on another matter, namely, the Dennis indictment, that these complaints of Hout and Evans existed. Burton had never even heard of any such complaints until he went to the Post-Office Department. Harlan did not mention them when Burton was employed (Harlan's Testimony, Record, p. 189; Burton's Testimony, Record, p. 220). The fact was, as shown in evidence, that those complaints of Hout and Evans had been disposed of by the Post-Office Department by the investigation and report of the inspector detailed for that purpose in St. Louis, November 14, 1902, before ever Senator Burton was employed by the Rialto Grain & Securities Company.

All this talk of Inspector Cochran and the District Attorney about a "case" pending, merely because these letters of Hout and Evans were put into what they call a "jacket" and they in their office parlance call it a "case," cannot change the real facts of the matter, which were merely these, namely, that these letters of Hout and Evans were sent to St. Louis to be acted upon by the Inspector in charge there, and that by his deputy an investigation was made and a report made, which *ended the matter of the complaints in these two letters* (which were the only complaints that Burton ever knew about) until after he was indicted.

We say, therefore, that the matter of these two letters, the only matter of which Senator Burton had any information, had been disposed of by the duly constituted officers of the Post-Office Department before ever Burton was employed by the Rialto Grain and

Securities Company, and there the matter ended so far as any evidence in the record shows.

But Inspector Cochran and the District Attorney say, No, the matter of the Hout and Evans letters was not ended, because these letters were put into a "jacket" and a "case" was made up, and *no report was made back to Washington*, and *no entries were made on this "jacket"* as to what the inspectors in St. Louis had decided about the case, and therefore they say the matter was still pending before the Department. The District Attorney, therefore, says that Senator Burton rendered services in the "case" before the department. Why? Not because those complaints were still pending as live matters before the Post-Office Department, for the complaints of Hout and Evans were ended November 14, 1902, when Inspector Price made his report to Inspector Dice, in charge at St. Louis, that there was nothing in those complaints, and there the matter ended down to the time of the trial in this case; not because there was anything really pending in the department, but because, forsooth, entries had not been made in Washington on the "jacket" kept there, as to how the matter had been disposed of. In other words, there was not anything really pending before the department in respect of these complaints of Hout and Evans, but certain entries had not been made on the files of the department. Is a Senator to be convicted of a crime for inquiring before a department as to a matter which has really been ended, because the matter may be said by an official in the Post-office Department to be pending, because he has not yet made certain entries on his books or papers? If so, then the question whether a person was innocent or guilty would depend not on whether any real question was pending before the Post-office Department, but upon whether or not certain entries existed on the documents or books of the department, and it would never be safe for a person to go to the Post-office Department to make any inquiry about an old case which had been there, for fear that

possibly certain entries had not been made on the files of the department.

Obviously mere office methods or book-keeping methods of the Post-office Department can have no weight or bearing upon the question whether or not a person appears before the department in a matter or thing before the department. Senator Burton did not appear before the Post-office Department at all in respect of any complaint made against the Rialto Grain and Securities Company, and all that occurred with respect to any such complaint was that when Burton appeared before the Post-office Department in respect of the Dennis indictment, he inquired whether any complaints had been made against the Rialto Grain and Securities Company, and was informed of the letters of Hout and Evans. But even if it be assumed that the receipt of such information under such circumstances, was an appearance by Burton before the Post-office Department in respect of the Hout and Evans letters (although Burton expressly stated that he would not appear before the department on behalf of the company on any such complaints [Cochran's Testimony, Record, p. 147], and Cochran testifies, page 147, that there was no discussion between him and Senator Burton of the merits of the representations of Evans or Hout) yet those letters would be the only "matter or thing" in respect of which Senator Burton, by any possible technical construction of the statute, could be said to have appeared before the Post Office Department. The entire testimony of all the witnesses completely negatives the fact that he appeared before the Post Office Department generally in respect of any question of the issuance of a fraud order against the Rialto Grain and Securities Company. So that the "matter or thing," within the meaning of Section 1782 of the Statutes, with which Senator Burton was concerned, if he was concerned at all, was merely the Hout and Evans letters, and not the general question whether a fraud order should issue against the Rialto Grain and Secur-

ities Company. Cochran testifies (page 146) that he never had any conversation with Burton in reference to the question of the issuance of a fraud order (Record, pp. 146, 147).

The proposition of the District Attorney was that because, according to the custom of the Department they made up what they called a "case," by entering these letters of Evans and Hout on what they called a "jacket" before they sent them to St. Louis, and then whenever any other letters came in afterwards making complaints against the Rialto Grain and Securities Company, they were treated by the Department as a part of the same case, and entered in the same jacket, although they of course related to different transactions of the Rialto Grain and Securities Company; that therefore all these matters collectively constituted one "case" against the Rialto Grain and Securities Company, and that this one case was pending before the Post Office Department. If, however, the real facts of the matter be regarded, and these letters making complaints against the Rialto Grain and Securities Company be treated as separate letters making different complaints, all this talk about "case," "jacket," etc., being disregarded, as it ought to be, as a mere office method of keeping papers and as having no bearing whatsoever upon the construction of the words "matter or thing" in Section 1782 of the Statutes, then it becomes clear that the only "matter or thing" with which Senator Burton had any connection whatsoever were the letters of Hout and Evans and the complaints made in those letters, and that this matter or thing had been completely disposed of by the Department before Senator Burton's employment by the Rialto Grain and Securities Company.

The other letters and complaints which were entered in this so-called "case" were matters and things with which the testimony shows Senator Burton had absolutely no connection or knowledge whatsoever, and he did not even know of their existence until after he was indicted, and, as above stated, Sen-

ator Burton never appeared generally before the Department in respect of the question of the issuance of a fraud order, and the question of the issuance of a fraud order was never even mentioned or referred to in any of his conversations with Cochran, the only officer of the Post Office Department before whom he appeared; nor did Burton influence or seek to influence Cochran in respect of any question of the issuance of a fraud order, for that would have been impossible, as it was not even mentioned or referred to, and Cochran further testifies (Record, page 147) that there was not even any discussion of the merits of the representations of Mrs. Evans and Mrs. Hout.

The "case pending before the Department" and the "case which was still undisposed of," which were so much talked of by the District Attorney and by Inspector Cochran when Cochran's evidence was given, are at the utmost mere artificial creations of the Post Office Department for their convenience in keeping their records, and they have no bearing upon the real question whether, as charged in the indictment, Senator Burton rendered any services in any matter or thing within the meaning of the statute. The only matter or thing, as we have shown above, with which he had any possible connection, were the complaints in the letters of Hout and Evans, and he rendered no services before the Department in respect of those, for all he did was to inquire, and, before the time of the inquiry, those had been disposed of, as we have shown, and before he was ever employed by the Rialto Grain and Securities Company.

Furthermore, after Senator Burton had been informed by Cochran that these Hout and Evans letters had been sent on to St. Louis for investigation, Burton wrote to Harlan stating this fact in his letter dated November 20, 1902 (Record, page 94), and Harlan wrote back in his letter to Burton dated November 22, that—

"The claims that you have referred to against the Rialto Grain & Securities Company have been inves-

tigated by a Post Office Inspector connected with this Department, and he found the actions of our company to be all right, and, we are informed, made a report in favor of our company relative to the same."

After this, of course, Senator Burton never gave these Hout and Evans complaints another thought, and, as Cochran's testimony and Burton's testimony, and all the testimony, abundantly shows, he never even knew of the existence of any other complaints. How absurd, therefore, to say that Senator Burton appeared before the Post Office Department and used his influence in order to prevent the issuance of a fraud order, either in this matter respecting Hout and Evans, or in any other matter of which he had no knowledge or information.

Letters and Telegrams.

After this full review of the *res gestæ*, of the nature of Burton's employment and the services which he actually rendered, of what he knew and did not know, we are prepared to read the LETTERS and TELEGRAMS in the light of the circumstances under which they were written or sent or received.

And by way of preface we state that these letters and telegrams show:

1. That they had no reference whatever to any fraud order inquiry.

2. They related wholly to matters distinct from and having no reference to any fraud order, and these matters were not within the prohibition of Section 1782, were entirely proper, and were such as in no possible construction of Section 1782 was the United States "interested therein directly or indirectly."

4. They contain no admission of the rendering of any prohibited services or of any offense what-

ever and were mostly if not altogether irrelevant and incompetent—of no evidenciary value against Burton, but properly read and understood are evidence in his favor in disproof of the charge laid in the indictment.

An examination of this record, particularly with reference to the questions of the District Attorney, the rulings and charges of the Judge, will show that the attempt to make or support a case under Section 1782 depended wholly for its success upon the ingenious use and arrangement of certain letters and telegrams, passing between Senator Burton and Thomas B. Harlan, his associate as attorney and counsel for Dennis. The letters were, with one single exception as the record shows, voluntarily turned over to the Government by Senator Burton through his counsel at the request of the District Attorney after the indictment had been found. None of these letters could have been before the grand jury with the possible exception of one, of date February 11, 1903 (p. 139). The letters, of course, must be read in the light of the exact relation of Burton to the Rialto Grain and Securities Company, the nature of his employment, and the testimony heretofore fully given in this brief as to everything he did or was asked to do.

The letters for the most part fully explain themselves and corroborate in all essential particulars the testimony of Senator Burton, Mr. Harlan and Mr. Kastor in this case. Certain excerpts from these letters separated from their context were used to create a suspicion of the possible existence of facts which were not, as they could not be, adduced in proof. Restored to the context, these excerpts are susceptible of clear explanation; indeed, they could have no other meaning than one consistent with the statements of Senator Burton as to his relation to the Rialto Grain and Securities Company, and his entire freedom from any offense under the statute, much less the specific offense charged in the indictment.

It is our purpose to take these letters and telegrams *seriatim* in their chronological order, with a summation of the testimony appertaining to each and to show exactly what they mean, and conversely, to show that they could not possibly have the meaning into which they were sought to be tortured by the Government in its attempt to make a case against the defendant.

Letter November 18, 1902, Harlan to Burton.

The first letter appears upon pages 91–2–3, and is a letter written in pursuance of the employment of Senator Burton, and advises him that the terms of his employment have been accepted; that that employment was to begin immediately, and generally advises him with reference to the trouble between the Brooks Brokerage Company and Dennis, which might result in a criminal indictment and prosecution. *It had no relation whatever to the Rialto Grain and Securities Company* and had only relation to the possible trouble that might ensue to Dennis. Moreover, it enters into elaborate detail to satisfy Senator Burton that Dennis was innocent of all wrong, but might become the victim of the machinations of Brooks. It requests (and this was with reference to the possible criminal proceeding in St. Louis against Dennis in connection with the Brooks Co.) that he should obtain certain information with reference thereto. This letter contained no reference to Hout or Allen or the Rialto Company. It was upon the receipt of this letter and in pursuance of the request therein contained that the first interview of November 20, hereinbefore narrated, was had with Cochran (*ante*, pp. 54–65). This letter went in without objection.

Letter November 20, 1902, Burton to Harlan.

The second letter in the order is the reply to the last letter, and is to be found on page 94 of the record. It will be recalled that in this first interview Senator Burton asked Mr. Cochran if it was the purpose of the department to proceed against Dennis in the court at St. Louis by reason of his connection with the Brooks Brokerage Company. After Cochran stated that he did not know the purpose of the Government as to the indictment of Dennis a conversation ensued in which Burton asked Mr. Cochran in a general way about the Rialto Grain and Securities Company, and was informed by Cochran that the two complaints by Evans and Hout had before that time been lodged in the department and had by the department been referred on the 7th of November, 1902, to Inspector Dice, a Post-office Inspector in charge at St. Louis (p. 217).

It will be borne in mind that in that interview Senator Burton informed Cochran of his professional relationship to Dennis and the Rialto Grain and Securities Company, and further informed him that he would not or could not appear in any proceeding in the department, but asked that he be notified of any proceeding which might be taken with a view of giving his client an opportunity to be heard.

Read in the light of these facts this letter of November 20 bears its own explanation. In this letter he says that he has assured the department that it is the purpose of the Rialto Grain and Securities Company to comply strictly with the law, and that it is its desire to remain at all times in perfect harmony with the department. The clause of the letter which was commented upon injuriously to the defendant at the trial was the last paragraph, as follows:

"In return, if agreeable, you may make remittance for my first month's pay" (p. 94).

It was claimed that this was a "service" rendered before the department in the matter then pending, to wit, the complaints of Hout and Evans. The words "in return" are obviously a loose expression of "by return mail, if agreeable." His compensation had been fixed under an agreement, the terms of which had been made prior to the letter of November 18, and pursuant to the terms of the agreement, which is undisputed, Burton's compensation was to be monthly in advance, and his first month's salary was due before he went to the department at all. This was tortured into meaning that he demanded an express fee of $500 for this particular visit to the department and for obtaining the information conveyed in this letter of November 20.

In this connection we call attention to the following statement, appearing on page 94 of the record:

"JUDGE KRUM: I would like to have Mr. Harlan's reply to that letter read.

COL. DYER: I will read that in its order as I take them up one after the other. I expect to introduce them all."

But it will not fail to be observed that the District Attorney closed the case without ever introducing that letter. The letter is dated November 22, 1902, and is to be found on pages 175–6 of the record. As will be seen, it was introduced by the defendant in connection with Mr. Harlan's testimony. The omission of this letter by the Government is confirmatory of the charge which we here now make, of an effort upon the part of the prosecution to supplement the utter deficiency of proof to support the indictment not only by using excerpts from these letters dissevered from their context, but by omitting the one letter in the entire correspondence that is most important to the defendant, and which most clearly shows and establishes his entire innocence of the charge contained in the indictment—namely, a letter which conveys to him the information that the complaints of Hout and Evans were baseless; that they had been investigated by the department, and

the actions of the company were found all right, and the further information that Harlan was informed that a report to that effect had been made.

By reference to the testimony as to the several interviews contained in this brief it will be seen that Senator Burton then testified (p. 220), and there is no proof to contradict it, that from that time forward he believed the Rialto Grain and Securities Company to be absolutely free from any charge whatever in the department upon any score, because he knew, and Cochran confirms him in such statement (p. 148), of no other complaints that were or ever had been made, or were ever pending in the department except the complaints of Hout and Evans, which had been reported as unfounded. Both Dice, the inspector in charge, and Price, the inspector under him, confirm the statement made by Harlan in this letter that the complaints of Hout and Evans had been investigated and a favorable report made on the 14th of November before the time of Senator Burton's employment and the said complaints were found to be groundless (see Record, pages 70 and 202–3). In other words, and we desire to make this point clear and emphatic, that, notwithstanding Cochran had mentioned these two complaints on the 20th of November, when Burton had his first interview with him, they had at that time been investigated and a report in favor of the company had been made.

We desire to advert again to that portion of the letter of November 20, which was used to the prejudice of Senator Burton at the trial; namely, his request for a remittance. In this letter of November 22, Harlan says :

"I enclose the Company's check for $500, *as per agreement.* This check should have been sent in my former communication, but I neglected to do so" (p. 175).

In other words, before Burton should have gone, or in fact had gone to the department at all, the $500 were due under their agreement and for the purposes

of the agreement, and no other, and before he received any money whatever (this being the first payment) he is notified that the only matter or thing ever pending before the department had been investigated "*and the actions of the Company found all right*" (p. 175; see, also, pp. 70, 202).

Letter of Harlan to Burton, November 22, 1902 (Text of *ante*, p. 64; Record, pp. 175, 176).

Letter December 2, 1902.—Harlan to Burton.

The next letter is the letter of December 2, 1902, on page 135–6 of this record. It appears in Harlan's testimony that he went to Washington in pursuance of the suggestion contained in the letter of November 22, to consult with Burton in reference to the troubles of Dennis, growing out of his purchase of the assets and business of the Brooks Brokerage Company, and to discover if possible the intention of the Government with reference to the prosecution of Dennis in that behalf. The letter of December 2, above referred to, is a letter written by Harlan to Burton upon Harlan's return to St. Louis. Much stress was laid upon this letter. *To this letter Senator Burton made no reply whatever.* In pursuance of this letter, or on account of any suggestions in it, he did not at any time visit the department or confer with any public officer of the Government. It conveys information for the most part, namely, that Dennis, whom Harlan insisted was absolutely innocent of any wrong, and as only embroiled by reason of his purchase of the Brooks Brokerage Company and the vindictive pursuit of him by Brooks, had been indicted and that by reason of such indictment he apprehended that a large number of complaints might be filed with the Post-office Department by those doing business with the Rialto Grain and Securities Company. It appears that this

apprehension was unfounded, because no such complaints were filed. The language of Harlan to which significance is attached by the prosecution in this letter is this:

"Locally, I believe we will be able to control the situation, as this business has been pretty thoroughly gone over by the inspectors, and they understand just what we are doing and how we are doing it. At your end of the line you will, of course, use your own judgment in handling the situation. We will at all times be glad to observe any request made by the Post Office Department, or to submit to any examination they may direct."

And the letter concludes by stating that the Dennis cases for which Burton had been employed in the first instance were set for trial on the 6th of January, and that Judge Krum and Harlan were then prepar ng for trial; that they would get the evidence together, and when they had got] all this done they would submit the whole case to Senator Burton for his consideration, and would certainly appreciate it very much if he could come West and engage in the trial (p. 136). This shows what Burton's relationship to the Rialto Grain and Securities Company was, and is confirmative of Burton's statements on that subject.

Burton never answered this letter. He never made any visit to the Department by reason of this letter. He never rendered any "services" in respect of complaints in the Department. In fact, no such complaints were made, and Harlan's fears were groundless.

There was no occasion for his visiting the department; he had nothing to say to the officers of the department if he got there; he had told Cochran that he would not participate in any way in the slightest, even if he thought the Government was oppressing his client in that behalf towards making an appearance or influencing any public officer. This is confirmed by Harlan's testimony with reference to his purpose of writing the letter and his understanding of the nature of Senator Burton's employment and the

duties he was expected to perform (see pages 183–4 of Record).

An effort was made in the cross-examination of Harlan by the prosecution to show that Senator Burton was expected to attend to all matters in the department under his employment, and that his employment was of that nature, and this letter was used a basis *for such examination. It was pertinently asked by* the witness in response to these questions of the Government prosecutor, *What matters there were before the department?* (Rec., p. 192). There was none to the witness's knowledge, and none has been shown to be there pending. That it was perfectly natural for Harlan to write this letter and other letters, keeping Senator Burton, who was general counsel of the company, thoroughly advised of all matters pertaining to the company, and that he would expect Senator Burton to act in any proper manner, leaving the matter of propriety entirely to his discretion and judgment, is the exact fact of this case.

Letter of December 3, 1902, Harlan to Burton.

The next letter appears upon page 137 of the record, and was written on December 3, 1902, the day following the writing of the last letter, to which, as we have said, Senator Burton made no reply, and concerning which he took no action whatever. This letter of Harlan of December 3 illustrates, however, that in his capacity of general counsel for the company, Burton was being advised by its local counsel, Mr. Harlan, of all matters concerning the company. This letter has no sort of relation to the charge alleged in the indictment. It is a letter advising Senator Burton that two men by the names of BOWMAN and SHOVE had probably falsely represented themselves as Post Office inspectors for the purpose of enforcing unjust demands against the Rialto Grain

and Securities Company, and it was written to Senator Burton merely to advise him of the facts. That is made clear by the following language: "I call it to your attention merely as a matter for your own information" (p. 137). And it is written for the further reason, as Harlan testifies, to try to uncover what he believed to be a fraudulent purpose towards his company (p. 201). The latter part of the letter however, shows the great desire of Harlan to keep Burton advised of the criminal proceeding against Dennis. It certainly does not, as we shall presently show, prove or tend to prove the crime alleged in the indictment. This letter was the occasion, as is shown by the preceding proof, of one of the visits of Senator Burton to Cochran.

Letter December 9, 1902, Burton to Harlan.

The foregoing letter of Harlan of December 3, was replied to by Senator Burton in a letter which is next in order and which appears on page 136 of the record and is dated December 9, 1902. The letter informs Mr. Harlan of the result of Senator Burton's interview as to whether there were any such inspectors as *Bowman* and *Shove*. It states: "There has gone from this office no instructions whatever about the Rialto Company, and there is nothing in this office against you at this time." This is, of course, responsive to the request to know whether the Government was, as was suggested in Harlan's letter, proceeding in a covert way to entrap the Rialto Company; and the following sentence "the matter in St. Louis, as you know, is in the hands of Mr. Dice there" is a suggestion not with reference to any complaint, but refers to the prosecution of the indictiment against Dennis. Certainly, it has no reference to any "pending inquiry" in the department within the knowledge of Senator Burton, because, as has been seen, Senator Burton was fully advised that the only two complaints

of which he had any knowledge whatever had been investigated in St. Louis and reported favorably to the Rialto Company. It is in evidence in this record that Dice was there as the representative of the department, assisting in the prosecution of Dennis. The letter has reference to this. This is further shown by the rest of the letter (p. 136) and by Burton's testimony (pp. 219, 220). Certainly, the language does not admit of the construction under the testimony as it appears was sought to be given to it by the Government, that it had reference to the Hout and Evans complaints; for Burton understood these were at an end (p. 220).

Much stress was laid on the concluding expression in this letter: "I will take care of things at this end of the line." This must, of course, be read in connection with that immediately preceding it; namely, a suggestion that Harlan should prepare carefully the case of Dennis for early the next month and that he must watch carefully to secure a fair and impartial jury; and the further suggestion that "these are all important matters which you must carefully consider," followed by the suggestion, "I will take care of things at this end of the line," meaning that he will prepare and care for any matters relating to the subject under discussion, namely, the Dennis investigation, that is required from him in Washington. So far as Burton knew there was no proceeding pending on the subject of a fraud order. This letter cannot be distorted to mean that he will seek to influence the department or any officer of the Government to prevent a fraud order issuing against the Rialto Grain and Securities Company. It must, like all the other letters, be read in the light of the facts of this case, among which is the fact that there was nothing in the Department for Burton or any one else to "take care" of, and this very letter so states.

The testimony bearing upon the letter of December 9 will be found collated in this brief relating to the second visit of Burton to Cochran, to which we refer

(*Ante*, p. 65). It will appear therein that the *sole purpose* of the visit was to make an inquiry as to these bogus inspectors, and Cochran and Burton both so testified. We refer to pages 140 and 219 of the record.

This letter was signed not by Burton in person, but by his Secretary, Smith (p. 211), and the expression "I will take care of things at this end of the line" is, of course, not the "rendering of any services" within the meaning of Section 1782; it is not any admission of an offense or services and is without any legal significance or effect.

It is positively established that the signature to that letter was written by Smith, Burton's private secretary, who was in the habit of dictating and writing letters for the Senator and signing Senator Burton's name to such letters (p. 211), and while Smith, in his testimony, is not positive that the words "I will take care of things at this end of the line" are his own, he states as follows:

"I am inclined to think that is an expression of mine, although I am not positive about it,"

and Smith gives his reasons therefor (Record, p. 212).

Telegram of February 5, 1903, Harlan to Burton.

The next in chronological order is the telegram appearing on page 222 in Burton's testimony, from Harlan to Burton, dated February 5, 1903, as follows:

"FEBRUARY 5, 1903, ST. LOUIS, MO.

"TO THE HONORABLE J. R. BURTON,
State Annex, Washington, D. C.

Dice delivered our books to State authorities where they are held subject to his order. Get order requiring him to deliver to us. Col. Dyer told me he had no further use for them." [Signed Thos. B. Harlan, p. 143].

It is necessary, to make this telegram intelligible, to go into the record to show what caused the sending of it. And this is also necessary to an understanding of the purport of the letter of February 11, relating to the same matter. It will appear on pages 141–2–3 and 221 of the record that Burton had visited Cochran on January 24, at the time when Burton had been advised that Dice was threatening to turn over these same books and records to the State authorities in St. Louis. These books of record relate wholly to the Brooks Brokerage Company, and had been used in the trial of Dennis, who had been acquitted on January 20, 1903 (p. 210), and there was no pretense that the Government had any further use for them. In company with Cochran, Burton went to the Fourth Assistant Postmaster General and the three to the Postmaster General, which last visit resulted in the Postmaster General ordering Mr. Cochran to send a telegram with reference to the matter (see pages 142-3 of the record). At this point the Court, realizing how far afield the investigation had gone, sustained an objection to the introduction of Cochran's telegram. The threat that was made in January by Dice to turn the books over to the State officers seems to have been carried out, and Burton received the telegram heretofore referred to of February 5, to that effect, and that was the cause of the last meeting, February 5, 1903, between Cochran and Burton, as testified to by Cochran on pages 143–4, and by Burton on pages 222–3. As the result of that interview, Cochran agreed to send a telegram of inquiry the next morning, which presumably he did, because Burton seems to have been advised by telegram that a satisfactory adjustment of the matter had been effected. That last telegram is the telegram referred to in the letter of February 11 (p. 139). That telegram is not in evidence, but is referred to in the letter, and the substance of the telegram is indicated by the letter.

Letter February 11, 1903, Burton to Harlan.

This brings us to the letter of February 11, 1903 (p. 139), which we might say, although it has no relation whatsoever to fraud orders or to any matters pending before the department, has nevertheless served as a keystone to the arch of this prosecution. It appears by this record that it was the only letter connected with the relation between Burton and the Rialto Company in the possession of the prosecution at the time of the presentment of the matter to the Grand Jury in St. Louis. And it was upon the distortion of this letter from its true relationship to the facts that, as we are advised, his conviction was largely secured. This letter was written and signed by Burton's secretary Smith (p. 211). This letter, of course, as all letters must be, should be read in the light of contemporary events and circumstances and should be limited in its interpretation to matters concerning which it must of necessity have related. Thus read, this letter relates entirely to the Brooks brokerage books, which Dice had turned over to the State authorities, who then (February 11) held them *subject to Dice's order*. Read in the light of the *res gestae*, it is plain that this letter has no relation to the charge in the indictment that Burton rendered services in the P. O. Department to prevent the issue of a fraud order. It must be borne in mind that correspondence had been progressing for weeks between Harlan and Burton with reference to the affairs of the Rialto Company; that since the inception of that correspondence there had been no reference whatever to *any pending fraud orders before the department*. In fact there was no such question pending in the department, as we elsewhere have shown (p. 87 of this brief). It must be further borne in mind that the only matter of complaint before the department of which Senator Burton was shown to have any knowledge whatever

had long since ceased to be of any importance and had faded entirely out of thought of either Harlan or Burton. This letter therefore can have no reference to any such matter.

The testimony to which we have called the Court's attention relating to the books of the Brooks Brokerage Company shows that there was on the part of certain officers of the Government a determined effort to keep these books and to use them to the injury of Dennis and the Rialto Company. It was desirous that the department should be first impressed with the injustice of such course and of the total want of relation between the books and any possible disclosures that might be obtained from them and that they had no relation whatsoever to Dennis and the Rialto Company, and that it was important to advise the department upon these points. That telegram, therefore, is to the effect that a satisfactory arrangement had been made with Dice with *reference to these books.* It can have no reference to anything else, because that was the only subject of any communication between Harlan and Burton at the time. The letters say "I have your telegram telling me that things were satisfactory between you and Dice," namely, that Dice had finally agreed to restore these books. "I hope you are not letting him mislead you in any way." That sentence was inspired by the fact that the prosecution against Dennis was in the opinion of both Senator Burton and Harlan vindictive and unnecessary and that Dice was the most active agent in such prosecution. He informs Mr. Harlan he "will be in St. Louis the fore part of next month, as soon as congress adjourns, and shall remain several days. Be sure to keep me advised if there is anything to do at this end of the line before going away," which means simply that if the Dice matter be not satisfactorily adjusted, it may be so. He says "I have tried to keep the department in good humor with Major Dennis and think I have succeeded." That is with reference to this prosecution

and the friction growing out of the effort to obtain the restoration of the books. It had no relation to any complaints against the Rialto Company or to the issue of a "fraud order." He says "If agreeable on the receipt of this, I wish you would have my month's pay sent in so I can reach it by Monday next." Probably meaning *receive* it by Monday next. The fact that he said he was trying to keep the department in good humor with Major Dennis would exclude the hypothesis that he was trying to do anything for the benefit of the Rialto Company with reference to any pending complaints. On the contrary, the reference to Major Dennis would show that he was endeavoring to show to the department that Major Dennis was entitled to its good offices in the return of these books, which were important to him—which were necessary to his own protection, and which were sought to be used to further vindictively prosecute him by an officer of the Government of United States. This is a natural explanation of this letter. To explain its terms upon any other hypothesis of its meaning would necessitate upon the part of the government that it should point out what particular occasion there was other than the one we have narrated on February 11, to keep the department in good humor with Major Dennis. At that time there is not a syllable of testimony showing that there was anything before the department concerning Major Dennis or the Rialto Company. Major Dennis had been acquitted of the charge that had been made against him by the Government in St. Louis. No inspection of the office of theRialto Company was being had and no complaints, so far as Burton knew existed or were being filed. So, therefore, this letter can only be given the meaning which we have ascribed to it. Certainly the Government of the United States has in no wise connected it with any efforts on Burton's part to prevent the issue of a fraud order, the only charge in the indictment.

The above and foregoing letters which we have considered fully are the only letters introduced by the Government. In the course of the testimony of Harlan, reference is made to two letters of Senator Burton that were returned to him and by him destroyed. It appears in the proof that these two letters had no relation whatsoever to the questions involved in the prosecution of the relationship of Burton to Dennis, or the Rialto Grain and Securities Company, but *were entirely of a private nature*, and the Government of the United States did not show or attempt to show otherwise. In confirmation of this statement we refer to pages 180, 181 and 201 and 225 of the record.

It also appears in the testimony of the witness Mahaney that two letters were destroyed by him at Burton's request (see Record, pages 121-2-3) This testimony of Mahaney is positively denied by Senator Burton (see pp. 224-5 of the Record). But the importance of this disclosure disappears when Mahaney is compelled to admit that the letters so destroyed were merely confirmatory of two telegrams which are in evidence in the case (see pp. 127-8 of the Record). Neither of these telegrams is in the remotest degree material or relevant to the issues in this case.

Telegram, February 11, 1903, Burton to Harlan.

There are also in testimony a number of telegrams. The first telegram appears on page 125 and is in response evidently to a telegram which is not in the record, but it is obviously in response to a telegram asking for the standing of one S. M. McGowan, of the Indian Department. It palpably has nothing whatever to do with any matter connected with the Post Office Department; was introduced to aid in producing the poisonous cloud of suspicions which was engendered by the letters which have been considered and we will discuss in its place the error of its intro-

duction and in the refusal of its exclusion. (Rec., p. 126.)

THE NEXT TELEGRAM is upon page 126 of the record and relates to the same matter.

Telegram, February 14, 1903, Mahaney to Burton.

The telegram of February 14 is next in order, appearing upon page 129 of the record. It relates wholly to a State investigating committee that was in St. Louis proposing to investigate the matters of the Rialto Company, and has no relation whatever to any matters before the department or to this case. But it shows that Burton was called upon for professional services *wholly outside of any federal matter*. There was apparently no answer made to this telegram, because none is introduced.

Telegrams of February 17, 1903, between Mahaney and Burton.

The next are the two telegrams of date February 17, appearing on page 130 of the record, one from Mahaney to Burton, and the other from Burton to Mahaney in answer, and relate entirely to the mailing of the check that was due Burton.

Telegrams, February 25, 27, 1903, between Mahaney and Burton.

The next telegram appears on page 128 of the record and is a telegram from Mahaney advising Senator Burton that there was a report from an apparently reliable source that two special inspectors had been appointed to investigate the Rialto Company and report to the Postmaster-General, and he was asked to verify this re-

port and advise them. The telegram is mere inquiry. The next is Burton's answer to that telegram, appearing on page 128, of date February 27, to the effect that there was no complaint in the department against the Rialto Company, and saying that he would write full particulars by mail. The defendant had the right to answer the inquiry made of him, and violated no law in so doing. This was at most an inquiry whether a matter was pending in the Department and was met with the answer that there was no matter pending. It could not then possibly be a service rendered in a matter pending before the Department. The significance of this message in Burton's favor is that Burton understood at that time there was no complaint in the department against the Rialto Company, which fact confirms what we have stated as to the letter of February 11, and Burton's testimony that he never knew of any complaints except Hout and Evans (p. 220).

Before leaving the subject of these letters and telegrams, we call the Court's attention to the fact that all of them that were within the keeping of Senator Burton or his counsel were voluntarily turned over to the government, and that includes all the letters except the letter of February 11 and another letter of January 19, in the possession of the prosecuting attorney, which was not introduced in evidence. That situation appears on page 228 of the record, where Col. Dyer makes this statement:

"It is admitted by the defendant that his two letters, one bearing date January 19, 1903, and the other bearing date February 11, 1903, were never in the possession of Judge KRUM or the defendant after they were written, or of Mr. Harlan at any time.

Judge KRUM: The admission goes to the extent that those two letters were not among those that I practically turned over to Col. Dyer."

See, also, in connection with this fact Burton's testimony (Record, page 256), and Harlan's testimony on page 181, in which it appears that these letters were

in Burton's possession after his indictment and were by him, through his counsel, turned over to the Government.

The Employment and Actual Services Rendered by Senator Burton as General Counsel, Having no Relation to any Matter Charged in the Indictment, and Not Prohibited by Section 1782, Which Services Were Paid for by the Defendant's Monthly Salary as General Counsel.

The employment of Senator Burton by the Rialto Grain and Securities Company was, as the testimony shows, suggested and influenced by his friend, Mr. Kastor, a man in nowise connected with the Rialto Grain Company. The nature and scope of that employment is shown by the testimony of Kastor, Harlan and Senator Burton himself, and is nowhere contradicted or attempted to be contradicted in this case. We refer to all of Kastor's testimony beginning on page 78 and extending up to and including page 90. Harlan's testimony, pp. 170 to 173 inclusive. Burton's testimony, pp. 215 and 216.

Senator Burton's employment was as this uncontradicted testimony shows, by reason of apprehended troubles and difficulties in court in St. Louis growing out of and relating to Dennis's purchase of and in connection with the Brooks Brokerage Company, and, as Harlan and Burton fully testify, with a view to securing his aid in enlarging the Rialto Company's business in the sale of securities. He was to be retained as general counsel of the company at a stipulated salary of five hundred dollars a month, to be paid monthly in advance. Under the terms of the agreement made between Burton and Harlan subject to the ultimate approval of Dennis, Senator Burton

was entitled to receive the agreed monthly salary whether he performed during that month any services or not. And it was expressly understood that he was to perform no services inconsistent with his duties as United States Senator in the departments or that should limit or interfere with his duties as United States Senator, during the session of the United States Senate (*Ante*, pp. 13–16).

Therefore, the compensation agreed upon was not and could not have been any recompense for services before the department in preventing a fraud order or otherwise. As a matter of fact, the most important services rendered by Senator Burton had no possible reference to any matter before the department against the Rialto Company. That appears again and again and abundantly throughout this testimony. The letters, most of which were introduced, have, as we have shown *ante*, pp. 95 *et seq.)*, reference entirely to the prosecution, in the Federal Court in St. Louis, of Dennis and Garland, and complications and difficulties growing out of such prosecution. That services, and substantial services, were rendered by the defendant in that behalf is also conclusively shown. To begin with, a full and complete consultation with reference to the affairs of Dennis and the particular matters involved in the Brooks Brokerage controversy was had at the time of Burton's employment (see pp. 91–2–3 of Record). Second, shortly thereafter Mr. Harlan came to Washington and had another conference lasting for two days, over these same matters, at which time we must not fail to note that neither Burton nor Harlan visited any department of the Government on any business relating to the Rialto Grain and Securities Company. The time was consumed entirely in discussing and going over these matters (see pp. 177, 190, 198 and 199 of Record, Harlan's Testimony. See also letter on page 136). Third, Major Dennis visited Washington to confer about his affairs with Senator Burtou, and their conference was concerning his affairs relating to this

matter and others, and although Major Dennis and Mr. Burton made a casual call upon W. E. Cochran, it was only incident to the Senator's ordinary visit to the department and by way of showing Major Dennis about, and, as fully appears, no conversation took place relating to any fraud order before the department (see pp. 118, 178 and 220 of the Record). Fourth, Senator Burton went to St. Louis for the purpose of consultation and discussion with reference to the Rialto Company's affairs, and particularly the matters affecting Dennis (see Record, pp. 119, 120, 177, 178, 185, 186, 227 and 228).

In the line of his duty as general counsel of the company, it appears in the record that he was called upon particularly in the McGowan matter, to find out and report whether McGowan, who had appeared in St. Louis claiming to be an Indian Agent, was an Indian Agent, and as to the character and standing of the man, the claim that he was presenting to the company, as Harlan testifies, being by the company regarded as outrageous. He also was called upon to obtain the restoration of the books of the Brooks Brokerage Company, which Dennis had turned over to the Government for use in their prosecutions against him, as well as others. He was asked to render services in respect of the *State* investigation. These were important services entirely outside of and having no possible relation to the prevention of a fraud order, and were such services as he might properly perform as counsel of the company.

By way of further illustration of the nature of these services and that the services he rendered were actual and substantial, we desire to call attention to the paragraph contained in the letter of December 2, beginning on page 135 of the record, the matter quoted appearing on the following page. It is as follows:

"The cases here are set for trial on the 6th of January, and Judge KRUM and I are preparing now for trial. We will get all the evidence in shape. I will thoroughly brief the law pertaining to the cases and

when we have got matters worked out, we will submit the whole case to you for your consideration, and would certainly much appreciate it if you could find it convenient to be here to participate in the defense."

The completed case thus prepared was brought on from St. Louis to Washington by Dennis upon the occasion of his visit on the 15th of December. After having gone through the case Burton went to St. Louis by appointment, and being fully advised in the matter entered into and had a full consultation with his associate counsel in St. Louis, on the 24th of December. All this was wholly outside of any services in the P. O. Department. The $500 per month covered all services that Burton agreed to render.

In addition to the services so rendered, as it appears from the testimony of Kastor (p. 81 of Record), and of Harlan (pp. 194–5), and of Burton (p. 227), he consented to become the general counsel of the company, and that his relationship to the company in that respect should be public, and that they should print his name along with the other officers of the company upon their letterheads and other literature. This, as Harlan said, Dennis would regard as in and of itself valuable to his company. In every respect he was held out to the world and treated by the company as its general counsel. At the time of his employment Harlan had brought to his attention particular work and services which Burton was expected to render to the company in connection with the establishment of a department of its business for the sale of securities, and no one can read Harlan's testimony without being impressed by Harlan's faith and belief that this business might be made large and lucrative by disposing of railroad and other securities taken by the trust companies under schemes of underwriting various enterprises and disposing of the same to investors upon commission, the company having extraordinary facilities for reaching the investment world.

Shortly after his employment, Senator Burton, in the preparation of this work, took the matter up with

Senator W. A. Clark, and afterwards made a visit to New York, but owing to the physical and mental collapse of Major Dennis immediately after his trial in the latter part of January, nothing came of this branch of the business. Harlan and the other officers of the company at the time of the Senator's employment and up to as late as March 1, 1903, fully expected that this feature of the business would be promoted (see Kastor's Testimony, pp. 86–7. Harlan's Evidence, pp. 171–2; also 182–3; also 188–9; also 191–2. See Burton's Testimony, pp. 216, 226–7).

IT WAS FOR THESE SUBSTANTIAL SERVICES AND OTHER SERVICES in the line of the duty of a general counsel, which were wholly and distinctly outside of any fraud order inquiry, that the monthly salary of the defendant was paid, and such payment was not compensation for alleged services to prevent a fraud order in a supposed or mythical "case" or "inquiry."

We elsewhere fully show that if there was any such "case" or "inquiry" pending Burton had no knowledge of that fact (see this Brief, pp. 84–95).

Final Conclusion as to "Services" Stated.

We have above produced all of the evidence that has the slightest bearing upon the actual acts and conduct of Senator Burton in any of the departments at Washington, or in any talk, conference, request or conversation to any public officer in relation to the affairs of the Rialto Company. We have analyzed and stated in their true relation to these facts every letter and telegram which appears in this record, and we desire to say in one comprehensive phrase that under these two heads is contained every atom of proof adduced by the Government against Senator Burton in support of the charge contained in the indictment. And we submit to any impartial mind, to any free and unprejudiced intellect, whether there is to be found in any part of it, or in it all taken together, the shadow of confirmation

or support to such charge. We have insisted and still continue to believe, as matter of law, that even had Senator Burton gone before the department in a controversy arising between a customer of the Rialto Company and the Rialto Company itself as to whether such company had subjected itself to the operation of the statute known as the "fraud order law" he would not have committed any offense denounced by Section 1782, Revised Statutes. But here is a case that shows, if it shows anything, that that is exactly what he did not do or attempt to do.

Finally, therefore, the letters and telegrams are totally inadmissible and immaterial for any purpose unless they are shown to be related to and connected with an act in violation of the statute, and they are not so shown.

WE FEEL CONFIDENT THAT THIS REVIEW OF THE EVIDENCE fully sustains our Second Point *(ante*, p. 20) that there was no evidence in the case to establish the guilt of the defendant, and that the Court erred in refusing, at the close of the Government's case (page 165), and also at the close of the trial (page 229), to direct the jury to return a verdict of not guilty.

III.

RE THE PAYMENTS BY CHECKS AND ITS EFFECT ON THE JURISDICTION OF THE COURT.

On the stipulated and undisputed facts as shown on the trial, the payments made by the four checks to Senator Burton were made in Washington and not in St. Louis, and the Court in St. Louis had, under the Constitution, no jurisdiction of the alleged offenses based on the checks, as set forth in counts six, seven, eight and nine of the indictment.

The evidence with respect to the deposit and payment of these checks was brief, simple and undisputed. It consists of the testimony of ARTHUR T. BRICE (a witness produced on behalf of the United States), occupying but three and one-quarter pages (Record, pages 105–108), and of the stipulation (Record, page 111, paragraph eighth), and of the checks themselves (Record, pp. 102, 103, 105, 112 and 113). The testimony of Arthur T. Brice, above referred to, was the Government's own testimony. The defendant Senator Burton did not produce any witness to contradict the said witness, Arthur T. Brice, and there was no conflict of testimony whatsoever as to what were the facts as to the deposit and payment of the said checks.

THIS TESTIMONY was briefly to the effect (page 106) that "this check was deposited in the Riggs National Bank to the credit of Senator Burton." "It was passed to his credit at that time" (page 108). "We had no special agreement with Senator Burton." "Upon the deposit of a check, endorsed by him, it was passed to his credit, and he was at liberty to check against the whole amount standing to his credit, in-

cluding the amount evidenced by the check itself." "If, for instance, he had a balance there to his credit of $1,000 and deposited a check for $500, and that was passed to his credit, that gave him a balance of $1,500 to check against. He might draw the whole of it without waiting to hear from the check."

The stipulation was (Record, page 111):

"The checks mentioned in counts 4, 5, 6, 7, 8 & 9 of the indictment 4992 were duly received by the defendant in Washington, D. C., and by him endorsed and deposited with the Riggs National Bank of Washington, D. C., and were afterwards duly paid by the Commonwealth Trust Company at St. Louis, Missouri, and that the said checks and all of the endorsements thereon may be introduced and used in evidence in the trial of said cause."

The only other evidence in regard to the payment of the checks is what is shown by the checks themselves and their endorsements (Record, pages 102, 103, 105, 112 and 113).

The facts, therefore, were simple and undisputed. Furthermore, as the facts were shown by the Government's own witness the credibility of the witness could not be questioned by the Government.

What we say, therefore, is that on these simple and undisputed facts, there was nothing to leave to the jury, but that as a matter of law, as shown by the numerous decisions of this Court and other courts referred to on this brief, the trial Court should have held that as respects these checks there was no payment made to Senator Burton in St. Louis, and should have excluded from the case and from the consideration of the jury all these checks and the evidence in regard to them and the evidence in respect of alleged services for which these checks were payment.

Instead of doing this, the Court, as above stated, permitted the jury to guess the rule of law applicable to these facts, and the jury made an erroneous guess, as the verdict shows.

This question arises on the record, not only on the

objections and exceptions which were made to the introduction of these checks (Record, page 102, middle), but also on the Court's charge to the jury in respect of these checks (Record, page 236–238 inclusive), to which instructions the defendant specifically excepted (Record, page 245, middle).

"JUDGE KRUM: Under Counts six, seven, eight and nine, the defendant excepts as to that part of the charge which submits the question of fact to the jury in the matter of payment.

THE COURT: That is clear enough. I can identify all of that."

The same question also arises under the instructions requested by the defendant and refused by the Court as to these checks, namely, instructions 10 and 11 (Record, page 244); also by the defendant's motions to direct a verdict for the defendant as respects each of the counts on the checks (Rec., pp. 165, 229).

A.

The Government's own evidence—brief, simple and undisputed—in the record shows that the four checks, when they were paid in St. Louis, belonged neither to Burton nor to the Riggs National Bank of Washington, but in the instance of each check to a subsequent endorsee, which was the owner of the check, and payment to such subsequent endorsee was not payment either to Burton or to the Riggs Bank. Neither the Riggs Bank nor any other bank was agent of Burton.

Take the check of November 22, 1902 (Record, pages 102–3), where a copy of this check and its endorsements are set forth. This check was payable to the order of J. R. Burton, and was endorsed on the back as follows:

"J. R. Burton.

Pay Commercial Nat'l Bank, Chicago,
or order,
The Riggs National Bank
of Washington, D. C.
Arthur T. Brice, Cashier.

Pay Franklin Bank
St. Louis, Mo. or Order,
Commercial National Bank
of Chicago,
Jos. T. Talbert, Cashier.
L. Kraemer, A. Cashr.
(Perforated) Paid."

There is in the record absolutely no testimony whatever to change or alter or contradict the legal effect of these endorsements. The first endorsement is an absolute endorsement by J. R. Burton. It was shown by the oral evidence that this check was on this endorsement deposited by Burton in the Riggs National Bank of Washington, and that Burton was given credit for the amount. In other words, Senator Burton *transferred the title* to this check to the Riggs Bank and the Riggs Bank became thereby indebted to him upon account for the full amount thereof, and thereupon and thereafter the relation of debtor and creditor existed, the bank being the debtor and Burton being the creditor. The title to the check, however, passed absolutely to the bank, and thereafter Senator Burton could neither recall it nor reclaim it nor have any further control of it. It was the property of the Riggs National Bank to deal with it as it pleased. Of course, Burton was liable on this check as an endorser, and that was thereafter his only relation to this check. The fact that he was endorser, however, did not prevent the absolute title passing to the bank, the same as in the case of any transfer of negotiable paper—the fact that there is an endorsement does not prevent the absolute title from passing. On the contrary, such endorsement and delivery are the means of transferring title thereto.

The Riggs National Bank of Washington, having this check, disposed of the same as follows: It endorsed this check absolutely to the Commercial National Bank of Chicago or order. There is absolutely no evidence in the record to contradict or qualify the legal effect of this endorsement, which was to *transfer the absolute title of the check to the Commercial National Bank of Chicago.*

So, also, the Commercial National Bank of Chicago, having the absolute title to this check, in turn *transferred the title to the Franklin Bank*, of St. Louis, Missouri, or order, by an absolute endorsement. There is absolutely no evidence in the record to contradict or qualify in any way whatsoever the legal effect of this absolute endorsement.

The check bears this further endorsement:

" L. Kraemer, A. Cashier,
(Perforated) Paid."

Kraemer was, presumably, the assistant cashier of the Franklin Bank of St. Louis, Missouri, to which bank, *as owner of this check*, payment was made by the Commonwealth Trust Company in St. Louis, the trust company on which the check was drawn.

[NOTE: Especially that neither the first endorsement, *i. e.*, to the Reggs bank, nor any subsequent indorsement was "*for collection*," but that *all* of the indorsements were absolute and unconditional.]

The other three checks—to-wit, the check dated December 15, 1902 (Record, page 105); the check dated January 22, 1903 (Record, page 112); and the check dated February 16, 1903 (Record, page 113), all show similar *absolute* endorsements, and there is also in the case of those other three checks absolutely no testimony whatever contradicting or qualifying the legal effect of these endorsements. On the contrary, as Burton received immediate credit on his pass book for the checks from the Riggs National Bank when he endorsed and delivered the checks to that bank, this

credit supports the legal effect of the endorsements and does not contradict or qualify the legal effect of the endorsements.

The testimony of Arthur T. Brice, cashier of the Riggs National Bank of Washington, was to the effect that this bank put these checks in the course of collection through its correspondents. There was not, however, any testimony whatever to show the legal relations between the Riggs National Bank and its so-called correspondents, and as above stated, there was absolutely nothing whatever to qualify the legal effect of these absolute endorsements.

We need only call the attention of this Court to the fact that an endorsement and delivery of negotiable paper passes the title to such negotiable paper. This fact of these absolute endorsements is therefore under the law sufficient to show the absolute transfer of title to these checks; and we repeat there is not a particle of evidence in the record to contradict or qualify in any way the legal effect of such endorsements and consequent transfers of title to these checks.

On these facts, therefore, these checks were paid in St, Louis not to J. R. Burton, not to the Riggs National Bank of Washington, but the check of November 22, 1902, was paid to L. Kraemer, A. Cashier, as is indicated (Record, page 103) by the stamp endorsed thereon, as follows:

"L. Kraemer.
A. Cashier.
(Perforated) Paid."

and the check of December 15, 1902, was paid to the National Bank of Commerce in St. Louis as is also indicated by the stamp on the back of the check, as follows (Record, page 105):

"St. Louis Clearing House.
26
The National Bank of Commerce in St. Louis.
Dec. 22, 1902.
(Perforated) Paid;"

and the check dated January 22, 1903, was paid to the National Bank of Commerce in St. Louis, as is indicated by the stamp on the back (Record, page 112), as follows :

" 26
St. Louis Clearing House.
The Nat'l Bank of Commerce in St. Louis.
(perforated) paid ; "

and the check dated February 16, 1903, was paid to the Franklin Bank of St. Louis, as is indicated by the stamp on the back of the check (Record, page 113), as follows :

" 11
St. Louis Clearing House.
March 3, 1903.
Franklin Bank.
(Perforated) Paid."

There is no pretense that Burton was in St. Louis when any of these checks was paid or that they were paid to him.

The only bit of testimony which shows or has any tendency to show what were the *legal relations* between the Riggs National Bank of Washington and the banks which were subsequent endorsers of these checks, is the statement by the witness Arthur T. Brice (Record, p. 107, bottom) that the check of January 22, 1903, was " sent direct to the National Bank of Commerce of St. Louis *for the credit of the Riggs National Bank.*" This is not inconsistent with the legal effect of the absolute endorsement of that check by the Riggs National Bank to the National Bank of Commerce in St. Louis. On the contrary this statement of the witness that this check was sent to the National Bank of Commerce of St. Louis " for the credit of the Riggs National Bank " indicates that the Riggs National Bank deposited this check in the National Bank of Commerce of St. Louis to the credit of the Riggs National Bank. This is in strict and full accord with the endorsement, for

it is in accordance with the ordinary course of procedure of one bank depositing a check in another bank for its credit that it shall make an absolute endorsement transferring the legal title.

The popular and ordinary way of speaking of such an endorsement and transfer of a check is that the holder of the check "deposits" it. Sometimes it is added that he deposits it to be collected or that he puts it in course of collection; but in law what he does is an absolute transfer of the title to the check, where the endorsements are absolute, as in the case of the four checks now in question; and the bank in which the check is deposited, by receiving the check and crediting the check on its books, becomes thereby the debtor to the bank or individual making the deposit. The depositor has parted with the title to the check and he has accepted the responsibility of the bank as his debtor.

It is not unusual for banking men and for the public generally to speak of a bank in a distant city in which an account is kept, as a "correspondent." It is also not unusual to speak of "collecting checks through their correspondents." These phrases "correspondents" and "collecting checks" are obviously not statements of any definite legal fact or of any definite legal relation. In order to ascertain what is the legal relation of the parties to negotiable paper, it is necessary to examine the negotiable paper itself and its endorsements, and all general talk of "correspondents" and "collecting checks through correspondents," such as stated by Arthur T. Brice, the witness who testified in regard to these checks, must be taken only as general expressions; and where, as in the case of these four checks, the facts as to their endorsement and payment are shown, these absolute endorsements and these facts as to the payment are in law the definite and controlling facts, especially as they are not inconsistent with the general understanding of what is generally meant when it is stated that checks are sent for collection through correspondents.

The Decisions of this Court and Other Courts Establish that on the Plain and Undisputed Facts of this Case, the Relation Between Burton and the Riggs Bank was that of Creditor and Debtor Immediately on the Deposit Being Made, and Credit Therefor Given to Burton, and not that of Principal and Agent, or Any Other Fiduciary Relation.

In the case of *Cragie vs. Hadley*, 99 N. Y., 131, Judge ANDREWS, giving the opinion of the Court of Appeals of New York (before RUGER, Chief Judge ANDREWS, RAPALLO, MILLER, EARL, DANFORTH and FINCH JJ., all concurring), said (page 133):

"The general doctrine that upon a deposit being made by a customer, in a bank, in the ordinary course of business, of money, or of drafts *or checks received and credited as money*, the title to the money, or to the drafts or checks, is immediately vested in and becomes the property of the bank, is not open to question (*Commercial Bank of Albany v. Hughes*, 17 Wend., 94; *Metropolitan Nat. Bank v. Loyd*, 90 N. Y., 530). The transaction in legal effect is a transfer of the money, or drafts or checks, as the case may be, by the customer to the bank, upon an implied contract on the part of the latter to repay the amount of the deposit upon the checks of the depositor. The bank acquires title to the money, drafts, or checks, on an implied agreement to pay an equivalent consideration when called upon by the depositor in the usual course of business. The further rule that one who has been induced to part with his property by the fraud of another, under guise of a contract, may, upon discovery of the fraud, rescind the contract and reclaim the property, unless it has come to the possession of a *bona fide* holder, is equally well settled, and does not at all depend upon the character of the wrong-doer, whether a corporation or natural person."

That case of *Cragie vs. Hadley* came within "the further rule" stated by Judge ANDREWS, as above quoted, and hence the depositor was entitled to rescind the contract and reclaim the things deposited. This was the same principle stated by Mr. Chief Justice FULLER in the case of *St. Louis & San Francisco Railway Co. vs. Johnston*, 133 U. S., 566, 576, referred to *infra* (p. 140).

A case directly in point is that of *Metropolitan National Bank vs. Loyd*, 90 N. Y., 530 (before ANDREWS, C. J., RAPALLO, MILLER, EARL, DANFORTH, FINCH and TRACY, JJ., all concurring, except TRACY, J., absent). The facts and decision of the Court in that case, are as follows, being printed here in full, to wit:

"Appeal from judgment of the General Term of the Supreme Court, in the first judicial department, entered upon an order made May 19, 1881, which affirmed a judgment in favor of the plaintiff, entered upon the report of a referee (Reported below, 25 Hun, 101).

This was an action by the plaintiff as indorsee of a check for $305, dated New York, October 29, 1878, drawn by the defendant upon the Corn Exchange Bank, payable, for value, to the order of Edward F. Murray, and by him indorsed in blank and delivered to the Merchants and Mechanics' Bank in Troy, by whom it was transferred to the plaintiff.

The defendant set up by answer that the check was deposited by Murray in the Troy Bank for collection, that Murray, before payment of the check, gave notice to the Corn Exchange Bank not to pay the same, and it obeyed his directions, whereupon the defendant sent Murray $305 in payment of the check.

The issues were tried before a referee, and he, in addition to the facts already stated in regard to the inception and different transfers of the check, found that Murray kept an account with the Troy bank, and on the 30th day of October deposited the check with it; that the bank received it as a deposit of money, entered the amount as cash to the credit of Murray in his bank pass-book, and returned his pass-book to him; that on the same day the Troy bank mailed the check to the plaintiff, its correspondent in New York, and its creditor, to be credited on account of its indebtedness, and it was so credited; that on the next day the plaintiff caused payment of said check to be

demanded of the Corn Exchange Bank, who refused to comply, on the ground that payment had been stopped, and on the same day notice of presentment and protest was given to the defendant. As conclusion of law he found that upon the deposit of the check by Murray with the Troy bank, it became the owner of the check and debtor to Murray for its amount, thereby denying the allegation in the answer as to the purpose and effect of the deposit. He also found the other facts which, if this conclusion is correct, enable the plaintiff to maintain the action.

DANFORTH, J. The question turns upon the character of the transaction between Murray and the Troy bank, and although the appellant's case has been presented with more than usual ingenuity, we find no reason to doubt the correctness of the answer given to the question by the referee, and concurred in by the General Term, after an opinion by one of its learned judges (25 Hun 101), which so fully reviews the evidence and the authorities, that we should be content with simply expressing our concurrence, if the case had not been sent here by that court as involving a question of law which ought to be reviewed.

The argument of the learned counsel for the appellant assumes and starts from the very point in dispute —it rests on the assertion that the Troy bank became the depositary merely of the check, on condition that in case of non-payment it should be returned to Murray and the credit canceled, or, as it is also put, became the holder of the check as the agent of Murray for collection for his account. These propositions differ in form only, and in either shape are at variance with the finding of the referee. The latter must prevail. It is not disputed that Murray held the check as owner—it was his property to do with as he pleased. He had held other checks. Some of these he placed in the Troy bank for collection; others he deposited and took credit therefor as cash upon his pass-book. As to the first he could give and revoke his own directions as often as he chose, but as to the others *when they were by his direction credited to him, the title passed to the bank, and they were not again subject to his control.* This we understand to be the result of the general rule applicable to such transactions (*Scott v. Ocean Bank in City of New York*, 23 N. Y., 289; Story on Bailments, Sec. 88; *Keene v. Collier*, 1 Metc. [Ky.] 415; *Brahm v. Adkins*, 77 Ill., 263; *Chapman v. White*, 6 N. Y., 412; *Bank of the Republic v. Millard*, 10 Wall., 152; *In re Franklin*

Bank, 1 Paige, 254; *Clark v. Merchants' Bank*, 2 N. Y., 380).

"The check in question was of the last class. It is true no express agreement was made transferring the check for so much money, but it was delivered to the bank and accepted by it, and the bank gave Murray credit for the amount, and he accepted it. That was enough. The property in the check passed from Murray and vested in the bank. He was entitled to draw the money so credited to him, for as to it the relation of debtor and creditor was formed, and the right of Murray to command payment at once was of the very nature and essence of the transaction. On the other hand, the bank, as owner of the check, could confer a perfect title upon its transferee, and, therefore, when by its directions the plaintiff received and gave credit for it upon account, it became its owner and entitled to the money which it represented. The check, therefore, for every purpose material upon this inquiry as between these parties was money. But even if the check had remained in the hands of the Troy bank, Murray could not have reclaimed it. If, as the appellant insists, the check had been deposited for a specific purpose—for collection, the property would have remained in the depositor, but there is no evidence upon which such fact could be established, nor is it consistent with the dealings between the parties, or with any of the admitted circumstances.

These show that it was the intention of both parties to make the transfer of the check absolute, and not merely to enable the bank to receive the money upon it as Murray's agent. The appellant assumes the contrary; but the referee refused to find in accordance with the defendant's theory, and upon the evidence his refusal was well founded.

The cases cited by the appellant have been examined; most of them are considered in the opinion of the General Term, *supra*, and the others lend no support to his contention, except upon the theory, which we think untenable, that the check was deposited for a specific purpose, and not generally.

The appellant urges that the check was not delivered by Murray as the result of a negotiation or application for its discount or sale, or for a credit, and if we look for such negotiation in the words of the parties only, this must be conceded; but if we take the conduct of the parties during the transaction, it is otherwise. They adopted a mode of intercourse which

fulfilled the function of spoken words, and brought about a result as intelligibly as words could have done. Suppose Murray, handing the check to the cashier, said, "buy this," or "give me the money on this," or "discount it for me," and the cashier taking the check gave back at the same moment its amount, there would then have been the express agreement which the appellant thinks necessary, and no one would doubt that the title to the check and money changed from one to the other, that thereby Murray incurred a contingent liability to the bank as indorser of the check, and that he could again obtain it only by a new bargain. So if instead of giving the money the cashier had said "yes" to the application of Murray and Murray had replied, "place it to my credit," or had himself taken the money and deposited it, the result would have been the same. What was actually done by the parties amounted to this: Murray noted the check and its amount and also another check upon a deposit slip or memorandum in these words:

"Deposited in the Merchants' and Mechanics' Bank by Ed. F. Murray, Troy, October 30, 1878:

Check	$305
Check	9
	$314"

gave it with the checks to the cashier, and he entered the gross amount on the credit side in Murray's book as cash, and returned the book to him. He examined it at that time. The bank thereby charged itself with a debt absolutely due to Murray (*Commercial Bk. of Albany vs. Hughes*, 17 Wend., 94) and he held the promise or obligation of the bank available to himself from that moment.

Another point is made by the learned counsel for the appellant. Upon cross-examination of one of the officers of the Troy bank, it appeared that on the 31st day of October, after examination of its affairs by the bank superintendent, its business was suspended. The witness was then asked whether "before that examination it was known that a state of things existed that would justify an injunction—was it known in the bank that it was insolvent?" Upon objection made, the appellant offered to show that it was known to the bank that it was insolvent, and that being rejected, an exception was taken. This is now relied upon. It

should not prevail. There is no allegation in the answer that fraud was practiced by the bank upon Murray, or that in receiving the deposit and giving credit to him there was an intent to withhold the sum credited or that it was done in contemplation of insolvency. Moreover, it is plain that the bank continued, after the deposit, debtor to Murray by his own choice, and not by reason of its solicitation or act. He could have withdrawn the amount the moment credit was given, and, in not doing so, consulted his own pleasure or convenience. Whether such defense, therefore, would, under any circumstances, avail the defendant, it is not necessary to inquire. No ground is assigned by the learned counsel upon which any other exception taken for the appellant can be supported, and we discover none.

The judgment should be affirmed.

All concur, except TRACY, J., absent.

Judgment affirmed."

Decisions of This Court as to the Deposit of Checks and Receiving Credit Therefor.

In the case of *Bank of the Republic vs. Millard*, 10 Wall., 152, the question before the Court was, whether the holder of a check on a bank could maintain an action against the bank for refusing payment, in the absence of proof that it was accepted by the bank or charged against the drawer; and it was held that he could not. Mr. Justice DAVIS, giving the opinion of this Court, says (page 155):

" It is no longer an open question in this court, since the decision in the cases of *The Marine Bank v. The Fulton Bank*, 2 Wall., 252, and of *Thompson v. Riggs*, 5 Wall., 663, that the relation of banker and customer, in their pecuniary dealings, is that of debtor and creditor. It is an important part of the business of banking to receive deposits, but when they are received, unless there are stipulations to the contrary, they belong to the bank, become part of its general funds, and can be loaned by it as other moneys. The banker is accountable for the deposits which he receives as a debtor, and he agrees to discharge these debts by hon-

oring the checks which the depositors shall from time to time draw on him. The contract between the parties is purely a *legal one, and has nothing of the nature of a trust in it.* This subject was fully discussed by Lords COTTENHAM, BROUGHAM, LYNDHURST and CAMPBELL in the House of Lords, in the case of *Foley v. Hill*, 2 Clark and Finnelly, 28, and they all concurred in the opinion that the relation between a banker and a customer, who pays money into the bank, or to whose credit money is placed there, is the ordinary relation of debtor and creditor, *and does not partake of a fiduciary character*, and the great weight of American authority is to the same effect."

As the relation between the bank and a depositor is "*the ordinary relation of debtor and creditor*, and does not partake of a fiduciary character," the bank is *not the agent of the depositor.*

In *Thompson vs. Riggs*, 5 Wall., 663, the plaintiffs had made deposits with Riggs & Company, bankers, and it was shown that such deposits or some of them were made in gold and silver coin. The allegation of the declaration was (page 673)

" that the plaintiffs, on the twenty-eighth day of February, 1864, having a balance due them at the bank of the defendants, of five thousand seven hundred and sixty-one dollars, as deposits previously made there in gold and silver coin, demanded payment and return of the same, and that the defendants then and there refused to make such payment and return as they had promised to do."

One of the questions in the case was whether the plaintiffs were entitled to the return of gold and silver coin, and the further question (which was attempted to be raised, but which was held properly not before this Court, not being in a bill of exceptions), whether the payment could be made in legal tender notes. On the question whether or not the bank was entitled to the return of the identical money deposited, this Court said, Mr. Justice CLIFFORD giving the opinion (page 677) :

"4. Testimony of the teller of the bank is express to the point that the plaintiffs never made any special deposit with the defendants, and there is no testimony in the case to support any such theory. On the contrary, it is clear that they made their deposits for their own convenience, and were credited for the amount in the usual way on the books of the bank.

Clear inference from the whole testimony is that the deposits of the defendants were made without condition or special agreement of any kind, and in such cases the law is well settled that *the depositor parts with the title to his money, and loans it to the bank.*

Deposits may be made under circumstances where the legal conclusion would be that the title to the thing deposited remained with the depositor, and in that case the bank would become the bailee of the depositor, and the latter might rightfully demand the identical money deposited as his property.

Contracts between a banker and his customers are doubtless required to be performed, and must be construed in the same way as contracts between other parties. When the banker specially agrees to pay in bullion or in coin he must do so or answer in damages for its value, and so if one agrees to pay in depreciated paper, the tender of that paper is a good tender, and in default of payment the promisee can recover only its market and not its nominal value.

But where the deposit is general and there is no special agreement proved, the title of the money deposited, whatever it may be, passes to the bank, and the transaction is unaffected by the character of the money in which the deposit was made, and the bank becomes liable for the amount as a debt, which can only be discharged by such money as is by law a legal tender."

In the case of *Marine Bank vs. Fulton Bank*, 2 Wall., 252, in which case the deposit was clearly a deposit *for collection*, and then afterwards the money was collected and placed to the general credit of the depositor, Mr. Justice MILLER, giving the opinion of this Court, said (page 257):

"If we are correct in these views, it would seem that the relation of principal and agent was changed the moment the money received was placed in the gen-

eral fund of the bank, and the plaintiff credited on its book with the amount."

The facts in that case, unlike the facts in this case, showed that the things deposited were deposited "for collection," and not that there was, as in the present case, an absolute transfer of title to the bank and an immediate credit on the books of the bank; but in that case this Court held that, *as soon as the plaintiff was credited on the books of the bank*, the relation of debtor and creditor existed and the money became the general money of the bank.

In the case of *Phœnix Bank vs. Risley*, 111 U. S., 125, the facts were that at the outbreak of the Civil War the plaintiff in error, the Phœnix Bank, was the correspondent in New York of the Bank of Georgetown, in South Carolina, and that the Phœnix Bank was indebted to the Bank of Georgetown, as depositor, in the sum of about $12,000. May 20, 1861, the Bank of Georgetown sold and assigned to Risley, the defendant in error, $10,000 of such deposit. On the 4th of January, 1864, Risley demanded payment of the $10,000 from the Phœnix Bank. January 5, 1864, proceedings were commenced by the United States to confiscate the deposit. Those proceedings

(Page 127) "were directed against certain specific money, which was the property of the Georgetown Bank and which the Phœnix Bank held as a special deposit in the nature of a bailment, and not against the debt which the Phœnix Bank owed to the Georgetown Bank arising out of their relations as corresponding banks."

(Page 127) "Mr. Parker, the cashier of the Phœnix Bank, speaking of the time when the marshal served the monition in the confiscation case upon him, says that there were no specific funds, separate in kind, in the bank belonging to the Georgetown Bank, and only a general indebtedness in account for money or drafts remitted, which had been collected. 'It was a debt. No specific money or bills the property of the Georgetown Bank.'"

This Court, therefore, held (page 133):

"1st. That the specific money in the Phœnix Bank, against which the confiscation proceedings seem to have been directed, and which was condemned, was the money of that bank, and not of the Georgetown Bank, and the loss, if any, is the loss of the Phœnix Bank.

2nd. That no such seizure or attachment was made of the debt due by the Phœnix Bank to the Georgetown Bank, if any such debt existed, when the proceedings were commenced, as would give the District Court jurisdiction of that debt, and no action condemnation of that debt, or order on the Phœnix Bank to pay it, was made, which can constitute a defense to the present action.

3d. That the right of Risley to recover the debt as assignee of the Georgetown Bank remains unaffected by those proceedings."

In giving its opinion, this Court, speaking through Mr. Justice MILLER, said (page 127):

"That the relation of the Phœnix Bank and the Georgetown Bank was that of debtor and creditor *and nothing more*, has been the settled doctrine of this court, as it is believed to be of all others, since the case of the *Marine Bank v. The Fulton Bank*, 2 Wall., 252. In that case it was said that 'All deposits made with the bankers may be divided into two classes, namely, those in which the bank is bailee of the depositor, the title to the thing deposited remaining with the latter; and that other kind of deposit of money peculiar to the banking business, in which the depositor, for his own convenience, parts with the title to his money and loans it to the banker; and the latter, in consideration of the loan of the money and the right to use it for his own profit, agrees to refund the same amount or any part thereof, on demand.' 'It would be a waste of time,' said the court, 'to prove that this latter was a debtor and creditor relation.' This proposition has been reaffirmed in *Thompson v. Riggs*, 5 Wall., 663; *Bank v. Millard*, 10 Wall., 152; *Oulton v. Savings Institution*, 17 Wall., 109; *Scammon v. Kimball*, 92 U. S., 362; and *Newcomb v. Wood*, 97 U. S., 581."

In *Scammon vs. Kimball, Assignee*, 93 U. S., 362, the facts were that an insurance company had become

bankrupt, and Kimball was the assignee in bankruptcy. Scammon was a private banker and the insurance company was a depositor with him. Scammon owed the insurance company for premiums due on the policies of insurance issued to him by said insurance company. The question in the case was whether the deposits of the insurance company with Scammon could be set off against the amounts due from Scammon to the insurance company as premiums on his policies, and the Court held that as these deposits were a debt, they could be set off against the moneys due for premiums on the insurance policies. This Court in giving its opinion said (page 369) :

" Deposits undoubtedly may be made with a banker under circumstances where the legal conclusion would be, that the title to the fund deposited remained in the depositor; and in that case the banker would become the bailee of the depositor, and the latter might rightfully demand the identical money deposited as his property ; but where the deposit is general, and there is no special agreement proved inconsistent with such a theory, the title to the money deposited, whatever it may be, passes to the banker, and he becomes liable for the amount as a debt which can only be discharged by a legal payment of the amount (*Thompson v. Riggs*, 5 Wall., 678 ; *Bank v. Wister*, 2 Pet., 325).

All deposits made with bankers, said Mr. Justice MILLER, may be divided into two classes; namely, those in which the bank becomes bailee of the depositor, the title to the thing deposited remaining with the latter; and that other kind of deposit of money, peculiar to banking business, in which the depositor for his own convenience parts with the title of his money, and loans it to the banker; and the latter, in consideration of the loan of the money and the right to use it for his own profit, agrees to refund the same amount, or any part thereof, on demand (*Marine Bank v. Fulton Bank*, 2 Wall., 256)."

" Money deposited with a banker, says Hill, creates a legal debt between the parties, which, under proper circumstances, may be recovered in an action at law. Hill on Trustees, 4th Am. ed, 173.

Authorities to the same effect are numerous and decisive; as, for example, it was expressly decided by the Master of the Rolls that money paid to a banker

becomes immediately a part of his general assets, and he is merely a debtor for the amount. *Devaynes v. Noble*, 1 Meriv., 561.

Sums which are paid, said Lord DENMAN, to the credit of a customer with a banker, though usually called deposits, are, in truth, loans by the customer to the banker; and the party who seeks to recover the balance of such an account must prove that the loan was in reality intended to be his, and that it was received as such. *Sims v. Bond*, 2 Barn. & Ad., 392.

Exactly the same rule was laid down in the Court of Exchequer, where it was held that money deposited with a banker by his customer, in the ordinary way, is money lent to the banker, with a superadded obligation that it is to be paid when demanded by a check. *Pott vs. Clegg*, 16 Mee. & Wels., 327."

In the case of an ordinary deposit with a bank, the word "deposit" is, legally speaking, a misnomer, as the above-quoted opinion points out, and what really takes place legally speaking is a "*loan by the customer to the banker.*" It might result in greater clearness of popular thought as to the relations between a bank and its customers if the words "deposit" and "depositors" were not used but some other words (if they could be found) which would express the legal relation. It is probably too late, however, to effect such a reform in terms; but this misuse of words cannot change the true legal relation.

The mischief of submitting to the jury the question whether or not the Riggs National Bank and the subsequent endorsees were agents of Senator Burton to collect the checks in question was the greater by reason of the fact that the use of this word "deposit" has frequently produced in the minds of laymen a misconception of the legal relation which exists between a depositor and a bank. As the matter was actually stated by the trial Court to the jury in the present case, it was practically left to the jury to guess whether as a matter of law the Riggs National Bank was or was not the agent of Burton. The result of such guessing on the part of laymen, especially with

the misuse, legally speaking, of the word "deposit," would not certainly be correct.

The 'Frisco Case, so Called in this Court, and Comments Thereon.

In the case of *St. Louis and San Francisco Railway Co. vs. Johnston*, 133 U. S., 566, the plaintiff, the St. Louis and San Francisco Railway Co., at its office in New York, drew a sight draft on the Atchison, Topeka and Santa Fe Railroad Co., at Boston, Mass., payable to the order of the Marine National Bank of New York, and deposited said draft in the Marine National Bank of New York (p. 567). The St. Louis and San Francisco Co.'s pass-book was at the time of the deposit in the possession of the bank, and remained in possession of the bank until some days afterwards, and (page 567) "no entry was made in it until some days afterwards, and then not by direction of the Railway Company."

(Page 568.) "The treasurer and assistant treasurer of the railway company testified that there was no arrangement or understanding, verbal or written, or dealing, to their knowledge, with the Marine Bank, by which the San Francisco Company was authorized or entitled to draw against out-of-town paper before collection, and that no drafts were ever so drawn; that they knew of no such agreement, verbal or in writing; that they drew on what they had and not on what they did not have; that the railway company had no occasion to draw against drafts or checks before collection, and did not do so; and that the company was allowed interest on its daily balances," &c.

There was, therefore, *no immediate credit on the pass-book of the depositor*, the St. Louis and San Francisco Railway Co., of the draft in question, and there was evidence showing, or tending to show, that under the course of business between the depositor, the St. Louis and San Francisco Railway Co., and the Marine National Bank, drafts such as the draft in question were taken *for collection*. On this showing, this Court,

Mr. Chief Justice FULLER giving the opinion, said (page 576):

"The question was one of fact rather than of law, and we think there should be something more in the evidence tending to establish that the San Francisco Company understood that the bank had become owner of the paper, than these mere credits for convenience, before that can be held to be the fact, notwithstanding it may be a recognized usage to allow a customer to draw. So far from there being shown an unequivocal course of dealing tending to support that conclusion, it seems to us the tendency of the evidence is otherwise."

There was another branch to this case, however, namely, that the complaint alleged and the facts showed that the Marine National Bank at the time it received the deposit was hopelessly insolvent, and that the president of the bank knew this fact; and hence this Court, speaking by Mr. Chief Justice FULLER, continued its opinion as follows (page 576):

"But if there could be any question on that branch of the case, we are unable to see that there could be on the other. This bank was hopelessly insolvent when the deposit was made, made so apparently by the operations of a firm of which the president of the bank was a member."

And the Court then goes on to hold that because of this fact the St. Louis and San Francisco Railway Co. would have a right to recover from the Receiver of the Marine National Bank the amount which had been collected by that bank on the said draft deposited by the St. Louis and San Francisco Railway Co.

This case of the *St. Louis and San Francisco Railway Co. vs. Johnston* does not at all support the ruling of the trial Court in the present case, as the Court below seems erroneously to have supposed (Rec., p. 102). On the contrary, this case is a decided authority against the ruling of the trial Court, for there is a necessary implication running all through the opinion of

this Court in the said case of the *St. Louis and San Francisco Railway Co. vs. Johnston*, that if that had been the case of an ordinary deposit of commercial paper under an absolute endorsement, and the bank had given immediate credit on the depositor's pass-book with the knowledge and assent of the depositor, that then the title of the commercial paper would have passed to the bank. The language of the Court on page 576 contains such necessary implication, for Mr. Chief Justice FULLER there says:

"The question was one of fact rather than of law, and we think there should be something more in the evidence tending to establish that the San Francisco Company understood that the bank had become *owner of the paper* than these mere credits for convenience, before that can be held to be the fact."

That is, referring to the facts in that case, that no entry was made on the pass-book of the San Francisco Company, and that that company did not know of certain entries which were made on the books of the Marine Bank, which the Court here refers to as "credits for convenience." All this necessarily implies that the Court was distinguishing the case then before it from the ordinary case where the commercial paper is deposited with the bank and immediate credit is given on the pass-book of the depositor, and the depositor is at liberty to draw immediately against such credit; all of which facts existed in the present case as to the four checks deposited with the Riggs National Bank.

The trial Court in the present case cited this case of *St. Louis and San Francisco Railway Co. vs. Johnston* in its ruling in relation to these checks, the entry in the record being as follows:

"That, I think, is a question of fact to be submitted to the jury; that, I think, is a settled law, as is determined by the case to which my attention was called, that of the Frisco Company against Johnston, 133 U. S."

This case of *St. Louis and San Francisco Railway Co. vs. Johnston* is not at all an authority for the proposition for which the trial Court cited it, namely, that it is *always a question for the jury* whether a bank acts as a collecting agent, or whether it receives commercial paper as an absolute deposit. What this Court in its opinion in the case of *St. Louis and San Francisco Railway Co. vs. Johnston* said was not that the question was one of fact *for the jury*, but that "the question is one of fact rather than of law," etc., as above quoted, which is a very different thing.

Not only so, but the question in that case of *St. Louis and San Francisco Railway Co. vs. Johnston* never was submitted to a jury. That case was a case in equity, and the trial Court (23 Blatchf., 489; 27 Fed. Rep., 243) held on the facts in the case that the title to the draft was in the Marine Bank; but when the case came before the Supreme Court of the United States, this Court held on the same facts that the title to the draft was not in the bank, and reversed the decree and remanded the case with instructions to enter a decree in favor of complainant, according to the prayer of the bill.

That case, therefore, did not involve any point, whether or not the question was a question to be submitted to the jury, and the trial Court in the present case was wholly in error when it said (Record, p. 102):

"That, I think, is a question of fact to be submitted to the jury; that I think is a settled law, as is determined by the case to which my attention was called, that of the Frisco Company against Johnston, 133 U. S."

Not only is this true, but there is *not one word of discussion, or any occasion for any discussion, by this Court in its opinion in said case of St. Louis & San Francisco Railway Co. vs. Johnston, as to what matters are questions for the jury and what matters are questions of law for the Court.* Nor is there the slightest statement or intimation, or implication of any kind whatsoever, in that case, that either in that case or in

any such case is there to be any exception to the general rule namely, that where the facts are simple and undisputed, the question on those facts is a question of law for the Court and is not a question of fact to be submitted to the jury.

By the clause "the question is one of fact rather than of law" we suppose the Court in that case meant to state that whatever question or difficulty there was in that case was to ascertain from the evidence whether or not the bank had in fact credited the depositor with the draft with the depositor's consent, and not that there was any difficulty in applying the rule of law to the case if there had been such a credit. No such difficulty is presented in the present case, because the facts are simple and undisputed that the checks were credited immediately on Se ator Burton's passbook, and credited with his consent. This present case is one of an ordinary deposit, where the checks were endorsed absolutely and were credited immediately on the depositor's passbook, with his consent, and with liberty to draw against them immediately—facts which did not exist in the case of *St. Louis & San Francisco Railway Co. vs. Johnston.*

Commercial Usage as to Checks and Credit Therefor.

THE IMPORTANCE OF THIS QUESTION AS TO WHO WAS THE OWNER OF THESE FOUR CHECKS IS VERY GREAT IN THE COMMERCIAL AFFAIRS OF THIS COUNTRY.

In the course of a year thousands of millions of dollars of checks go through the various banks of this country. A check may be drawn in San Francisco and travel to New York and back again and go through half a dozen banks or more. Any bank that had received this check with absolute endorsements in regular course, and had received it on deposit from one of

its depositors, whether such depositor was an individual or a bank in a distant city, would be very much surprised if he were told that such check did not belong to the bank, but that the bank was the agent of the payee named in the check, and that what the banks were doing was to collect it through a series of banks, each of which was agent of the payee named in the check.

Consider for a moment what would be the necessary legal effect if each bank, being subsequent endorsee of a check, as were the subsequent endorsees of the four checks in question, was regarded as a mere agent to collect that check. The first and most obvious effect would be that a bank is not the owner of the checks which it has in its vaults at the close of the day's business, but that it holds those checks as the agent for A, B, C and D all over the country, and that the money which will ultimately be paid on those checks belongs to A, B, C and D. If this were so, then, whenever a bank went into insolvency, all the checks and other commercial paper which it had on hand it would hold, not for *pro rata* distribution among its creditors, but it would hold one check as the agent of the original payee of the check, another check as the agent of the original payee of that check, another check as the agent of the original payee of that check, and so on.

There is no such absurd commercial law as that with respect to checks bearing absolute and unrestricted endorsements. On the contrary, the law is that when a bank takes the check *and credits the depositor* for the amount thereof, the bank thereby becomes liable as debtor to the depositor, and consequently the check belongs to the bank and is its own property, and in case of an insolvency all such checks which the bank then holds by absolute endorsements, and for which it has credited the depositor, are the bank's property, to be divided *pro rata* among its creditors.

We do not mean to state that a bank may not take a check or other item "for collection," or that it may not forward a draft or note merely to be collected; but

in such a case the bank does not, at least ordinarily, give credit on its books, but treats the matter of collection by entering up the item in its collection account, and crediting it only when it is paid.

The New York Clearing House several years ago, recognizing the desirability of having all checks and other negotiable paper which should be deposited with the New York banks and collected through the Clearing House, endorsed so as to confer an *absolute title* upon the bank with which they are deposited, and so on through all subsequent endorsees, adopted the following resolution (June 4, 1896), to wit:

"*Resolved:* That on and after the 1st day of July, 1896, members of this Association shall not send through the exchanges any checks, sight drafts, notes, bills of exchange or other items having thereon any qualified or restrictive endorsement, such as 'for collection' or 'for account of,' unless all endorsements thereon are guaranteed by the bank, member of the Association, sending such checks, drafts, notes, bills of exchange or other items. Any such items sent in violation of the above requirements shall be returned directly to the member from whom they were received, and shall in all respects be subject to the regulations contained in Section 15 of the Constitution of the New York Clearing House Association."

The above quoted rule has been in force ever since 1896 among the banks which are members of the New York Clearing House. The obvious purpose of the rule is to prevent any endorsement which would qualify the absolute title of the holder of the checks or other negotiable paper which should pass through the Clearing House, and to require that all endorsements should be, as were the endorsements of the four checks now in question in this case, absolute endorsements conferring absolute title upon the banks with which the checks should be deposited, and upon all subsequent holders.

Why this rule was adopted by the New York Clearing House cannot be better stated than by referring to the decision of this Court in the case of *Commercial*

Bank of Pennsylvania vs. Armstrong, 148 U. S., 50 (1892), in which Mr. Justice BREWER, giving the opinion of this Court, said (page 56):

"The Fidelity received the paper as agent, and the endorsement 'for collection' was notice that its possession was that of agent and not of owner. In *Sweeny v. Easter*, 1 Wall., 166, 173, in which there was an endorsement 'for collection,' Mr. Justice MILLER said: 'The words "for collection" evidently had a meaning. That meaning was intended to limit the effect which would have been given to the endorsement without them, and warned the party that, contrary to the purpose of a general or blank endorsement, this was not intended to transfer the ownership of the note or its proceeds.' And in *White v. National Bank*, 102 U. S., 658, 661, where the endorsement was 'for account,' the same Justice, speaking of the endorsement, said: 'It does not purport to transfer the title of the paper, or the ownership of the money when received.' The plaintiff, then, as principal, could unquestionably have controlled the paper at any time before its payment, and this control extended to such time as the money was received by its agent, the Fidelity."

The purpose of the making by the New York Clearing House Association of the rule above quoted was to prevent just these very endorsements—"*for collection*" and "*for account of*"—mentioned by Mr. Justice BREWER in his opinion above quoted, and to require a general and absolute endorsement in order, in the language of Mr. Justice MILLER above quoted, "to transfer the *ownership*" of the checks, notes and other commercial paper.

An instance of the endorsement of negotiable paper "for collection" is furnished in the case of *Evansville Bank vs. German-American Bank*, 155 U. S., 556, where this Court, Mr. Justice BREWER giving the opinion, said (page 562):

"It [The Fidelity Bank] received it as an agent, and the endorsement "For collection, for German-American National Bank of Peoria, Illinois," was notice to it and every subsequent holder that it was forwarded simply for collection."

B.

But even if the Riggs National Bank of Washington was the agent of Burton to collect the four checks (which we deny), yet the subsequent endorsees of said checks, if they were agents at all (which we deny), were the agents of the Riggs National Bank and were not the agents of Burton. Inasmuch, therefore, as such subsequent endorsees, to whom the money was paid in St. Louis, were not the agents of Burton, Burton was not present in St. Louis in the persons of such subsequent endorsees, and Burton did not receive any money in St. Louis on the said checks by any constructive presence through such subsequent endorsees as agents; for they were not his agents, but if agents at all, they were the agents of the Riggs National Bank.

The trial Court erroneously assumed (Record, p. 238, top), that if the Riggs National Bank was the agent of Burton to collect these four checks, then all subsequent endorsees were likewise the agents of Burton. In this the Court was clearly in error; and exception was taken to all this part of the charge (Record, p. 245).

On this point we need only cite the case of *Hoover vs. Wise*, 91 U. S., 308, in which this Court, Mr. Justice HUNT giving the opinion, after citing several cases, says (page 313):

"These cases show that where a bank, as a collection agency, receives a note for the purposes of collection, that its position is that of an independent contractor, and that the instruments employed by such bank in the business contemplated are its agents, and not the sub-agents of the owner of the note."

In the present case, as respects the four checks (if it is to be assumed, contrary to the fact, that the Riggs National Bank was the agent of Burton to collect these four checks), then the case as to the subsequent endorsees of the checks (if, contrary to the fact, they are to be regarded as agents of anybody as respects the collection of the checks), is no different from what it would have been if the Riggs National Bank had sent one of its clerks or messengers with the checks in person to St. Louis, with instructions to him to obtain the money on the checks and to bring the money itself back with him to Washington. In such case, the clerk or messenger would have been the agent of the Riggs National Bank and not the agent of Burton. So, likewise, if the subsequent endorsees of these four checks are to be treated as agents at all (which we deny) then they are the agents, not of Burton, but of the Riggs National Bank.

Hence Burton was not present in St. Louis when these checks were paid ; he was not there in person and he was not there constructively through any agent. Hence the Court clearly erred, on the undisputed facts in the case, in submitting to the jury the question whether or not the checks were collected by the Riggs National Bank or by any subsequent endorsees, as agents of Burton.

A similar decision was made by this Court in the case of *Exchange National Bank of Pittsburgh vs. Third National Bank of New York*, 112 U. S., 276, where the principles laid down in *Hoover vs. Wise* were reaffirmed, that case being cited and referred to on page 282, and again on page 287, and the Court laying down the principles which decided the case of *Exchange National Bank vs. Third National Bank*, on page 290, citing the English case of *Van Wart vs. Woolley*, 3 B. & C., 439.

In this case of *Exchange National Bank of Pittsburgh vs. Third National Bank of New York*, the Pittsburgh bank sent to the New York bank for collection certain drafts, and the New York bank, in turn,

sent them to a Newark bank, and this Court in said case held the New York bank liable to the Pittsburgh bank for the negligence of the Newark bank, said Newark bank being held to be not the agent of the Pittsburgh bank but the agent of the New York bank.

See, also, decision to same effect in *Tradesman's National Bank of Pittsburgh vs. Third National Bank of New York*, 112 U. S., 293.

Under this Point (III.) we maintain the following propositions:

1.

That the facts relating to the checks being stipulated and undisputed, the question whether the monthly compensation represented by those four checks which were received and transferred in Washington was a question of law *simpliciter*, and the Court erred in submitting its decision to the jury (Discussed in this brief, pp. 151-153).

2.

That on the stipulated and undisputed facts the Court ought to have held that the "compensation" represented by the checks was received by the defendant in Washington and not in St. Louis (Discussed in this brief, pp. 120 *et seq.*).

3.

The Court erred in its charge to the jury that the receipt of the money on the checks at St. Louis was the "gist of the offense," and that if the jury found that the Riggs Bank was not the "absolute owner" of the checks, a payment of the checks to its endorsee was in law a payment of the money to Burton himself in St. Louis, although he had parted with the checks and was not

present in St. Louis when the transferee under the Riggs Bank collected the money thereon (Discussed in this brief, pp. 153, 155–6).

4.

The Court erred in adopting and applying to the case the doctrine of imputed and constructive presence of the defendant in St. Louis by reason of the collection of the checks, in that city, if the jury found that the Riggs Bank was not the "absolute owner" of the checks (Discussed in this brief, pp. 165–170).

1.

On the stipulated facts (Stipulation 8th, Rec., pp. 97, 111), and on the undisputed evidence, the checks and their endorsements (Rec., pp. 102, 105, 112, 113), and the undisputed testimony of Government witness Brice (Rec., 105-109), cashier of the Riggs National Bank, Washington (who is the only witness on the subject), the Court erred as to the said checks (which are respectively the foundation of the 6th, 7th, 8th and 9th counts of the indictment) in the radical, fundamental and material particulars which we proceed to point out.

The facts being stipulated and undisputed, the question whether the monthly compensation or salary of $500 represented by the November, December, January and February checks were received by the defendant in Washington or in St. Louis is a question of law, pure and simple, as much so as if these facts had been found in a special verdict, and as such question of law ought to have been decided by the Court instead of being, as it was, "submitted, over defendant's objection, to the jury as a question of fact" (Record, pp. 102 ; charge of Court, Rec., 236, 237, 238 ; defendant's instructions 10 and 11 (p. 244) *refused).*

In this the Court abdicated its own constitutional duty of declaring the law arising upon the written in-

struments (the checks and their endorsements) and the stipulated and undisputed facts, and erroneously cast upon the jury the decision of the question of law thus arising.

Upon such stipulated and undisputed facts, the question of law thus arising *as to the place where the alleged offense was completed* upon which depended the jurisdiction of the Court in St. Louis was precisely this, viz., whether within the meaning of R. S., Section 1782, Burton as between him and the Rialto Company "received" his "compensation for services rendered," in Washington, where he received the checks, which checks he accepted, retained, transferred to the Riggs bank for value, and which checks were paid to transferees holding under the Riggs bank in St. Louis, or whether such compensation was not received by Burton until the money was actually paid on the checks to the transferees of the Riggs bank in St. Louis. On this proposition the Court should have said "yes" or "no," and not left its decision to the conjecture of the jury.

We show hereafter the reasons for the position that the Court should have ruled as to the compensation covered by the checks that such "compensation" was "received" by Burton in Washington. This point we do not stop to discuss in this place, our present point being that the Court erred in submitting the decision of the question of law arising upon the stipulated and undisputed facts to the jury.

We show hereafter that, as respects the jurisdiction of the Court, it is immaterial under the facts whether the Riggs bank was the mere agent of Burton to collect the money in St. Louis, or whether the Riggs bank became the absolute owner of the checks; but if such inquiry was, as the Court held it to be, the controlling question, then we insist that it was the duty of the *Court* to have decided this question and not to have left its decision to the guess of the jury; and this, too, without giving the jury any instructions whatever to guide the jury in making their decision.

There was no agreement between the Bank and Senator Burton as to the legal effect of his unqualified endorsement of the checks and receiving immediate credit therefor (Rec., p. 107) and, therefore, the Court had no basis or justification for its action in allowing the jury to find as a fact an "intention or understanding" as to the Riggs bank being a mere agent contrary to the necessary legal effect of the checks, their endorsement and the immediate credit given to the defendant therefor. There was no basis of fact for the finding by the jury of any "intention or understanding" outside of or contrary to the legal effect of the written instruments, their indorsement and the receiving by Burton of immediate credit therefor, and the verdict of the jury on counts 6, 7, 8 and 9 contrary to such legal effect is manifest error.

We submit and urge with confidence that the defendant's 10th and 11th instructions which the Court *refused*, stated the law correctly and the Court erred in refusing those instructions (Rec., p. 244).

2.

But if we are mistaken in the foregoing proposition that the Court ought to have decided the question as to whether the monthly payments represented by the checks were received by the defendant in Washington or in St. Louis, and if it was proper for the Court to submit this question to the jury, then the Court erred in its charge to the jury on this subject in the material particulars which we proceed to point out.

The Court said in its charge (p. 236):

"This suggests an important feature of the case, for the reason that unless it be true that the accused [Burton] received the money represented by and paid on this check at St. Louis, this Court would have no jurisdiction to try the case.

"The Constitution of the United States confers upon the accused in every criminal case the right to be tried by an impartial jury of a state and district wherein the crime shall have been committed.

"The receipt of the money is the gist of the crime charged against the accused, and if he did not receive it in this district, in fact in St. Louis where he is charged to have received it, he is not amenable to the law in this District, and cannot be convicted in this Court on this sixth count. Accordingly, it becomes your duty to ascertain and find from the evidence, what were the true relations between the accused and the Washington bank, when he deposited the check in question with that bank, and what was the understanding between them as to their respective rights in relation to the check and the proceeds thereof. On this question the Court charges you as follows (p. 237):

"If it was the intent and understanding of the Washington bank and the accused at the time the latter deposited the check in question with the former, that the bank should forward the same in the usual course by and through its correspondents to St. Louis, for payment, and that in so doing it, and its correspondents should act only as the agent of the accused for that purpose, then the final payment by the Commonwealth Trust Company at St. Louis, of the check to the correspondents of the Washington bank, *would amount in law to a payment in St. Louis as charged in the sixth count, of the amount of the check to the accused.* If, on the contrary, it was the understanding and intent of the Washington bank and the accused at the time the latter deposited the check in question with the former, that the bank should become the purchaser of the check, and should thereafter be *the absolute owner thereof*, and not act as just indicated, as the agent of the accused in the collection of the check, then the payment at St. Louis by the Commonwealth Trust Company, would amount in law to a payment to the Washington bank and not to the accused. In the latter event no crime would have been committed by the accused in this District, by reason of the check referred to in the sixth count of the indictment."

"In order to find the accused guilty on the sixth count, you must find from the evidence, by the same measure of proof as is required in all criminal cases, that the check referred to in the sixth count, was deposited by the accused in the Washington bank for collection, and that the bank was to act in collecting the same, as the agent of the accused, and not as the owner of the check in question" (p. 237).

On the next page (p. 238) the Court repeats the view that the final payment of the check in St. Louis would be in law a payment to Burton *at* St. Louis, unless the Riggs bank had "become the purchaser of the check and its *absolute* owner."

3.

The charge of the Court is erroneous in the following particulars:

(*a*) It makes the question whether the defendant "received" "compensation" in Washington or in St. Louis depend upon the actual receipt of "the *money* represented by the checks" (p. 236). "*The receipt of the money* is the gist of the crime charged against the accused" (p. 236), and the Court makes this question further depend (p. 237, top) upon "the true relations between the accused and the Washington bank when he [Burton] deposited the check in question with that bank, and upon the understanding between them as to their respective rights in relation to the check and the proceeds thereof," there being no understanding on this subject outside of the legal effect of what was done" (Rec., p. 107).

The question before the Court on the point of "compensation" to the defendant, represented by the four checks, was and is whether, as between the defendant and the Rialto Company, his employer, the defendant received the compensation represented by the checks in Washington or in St. Louis.

This question was and is one between the defendant and the Rialto Company, and it does not necessarily depend, as the Court stated to the jury (p. 237), upon "the true relations between the accused and the Washington bank," nor does it necessarily depend, as the Court held (pp. 236-7-8), upon whether Burton received the "*money* on the checks in St. Louis" or in Washington, nor upon the question whether the Riggs bank became the "*absolute* owner of the checks."

Under the constitution the case must be tried by an impartial jury of the State and district where the crime charged was committed.

Every act which the prosecution attempted unsuccessful to prove was an act done in the Post-office Department in Washington, the place named in the indictment, and not elsewhere. None are alleged to have been rendered in St. Louis nor was any attempt made to prove any services in St. Louis. If the compensation for the services rendered (even if they had been of the prohibited kind) was " received " by the defendant in Washington it is clear, and was so admitted by the Court (pp. 236, 237), that the Court had no jurisdiction over the offences charged in the 6th, 7th, 8th and 9th counts of the indictment, and upon which the defendant was found guilty and sentenced.

Compensation Represented by the Checks Was Received in Washington and not in St. Louis.

(*b*) We submit on this point the following propositions :

1. The defendant received his monthly salary as general attorney in negotiable checks sent to him by his request in that form to the City of Washington and there received by him. The defendant having accordingly received the checks in payment, and having indorsed and delivered them to the Riggs Bank and received credit therefor in Washington, and the checks having been duly honored when presented in St. Louis by transferees of the Riggs Bank, the defendant not being present in St. Louis, it necessarily follows that the defendant, as between him and his employer (the Rialto Company), received his compensation in the City of Washington.

There was never a moment's time after the defendant received and retained and thus disposed of the

checks when he could have maintained any action against his employer for the monthly salary represented by the checks, and this is a decisive test that the defendant's compensation for whatever services were represented by the checks was received by the defendant (as he had specially requested) in the City of Washington. If the checks had not been paid in St. Louis when presented the question might be different.

Under these circumstances the checks were a payment to the defendant when he received them at his request in Washington, or at all events as soon as he negotiated or disposed of them in Washington for value to the Riggs Bank. There was never a moment's time after such receipt and disposition of the checks by the defendant, when the defendant was entitled to the checks or their possession so as to tender or deliver them back to the Rialto Company, and never a moment's time when the defendant could have maintained an action against the Rialto Company, for the compensation represented by the several checks. And if the defendant after he parted with the checks and the title thereto could not have sued the Rialto Company for his services represented by the the checks (*ante*, pp. 128 *et seq.*, and cases), how can it be said that he had not received compensation for such services and received it in Washington? Nor could he have sued the bank in St. Louis.

The surrender by the defendant of the negotiable checks to the Rialto Company would be a *sine qua non* to the defendant's right to sue the Rialto Company for his compensation, and how can it then be said that the defendant had not received compensation from the Rialto Company when he had parted with the title to the checks (*ante*, pp. 133 *et seq.* and cases) and was not entitled to them or to their possession and was wholly disabled from surrendering them to the Rialto Company?

And, moreover, there never was a time after such endorsement and delivery of the checks to the Riggs

Bank in Washington and the stipulated credit received by Burton in Washington therefor when any one else but the Washington Bank or its indorsee or some subsequent indorsee was entitled to the possession of the checks or entitled (as against Burton) to collect the money on the checks, and when collected to hold it as its own, it having already paid Burton therefor. How then can it be said (as the Court allowed the jury to find) that the Riggs Bank was the mere agent of Burton to collect the checks, that the checks were Burton's property and that payment of the checks in St. Louis to a subsequent indorsee was in law a payment of money to Burton himself at St. Louis?

This view proceeds upon the theory that by the receipt by the defendant of the checks in Washington and their endorsement and delivery for value in Washington under circumstances wherein the defendant never again became entitled to the checks or to their possession, the defendant received the compensation represented by the checks from the Rialto Company in Washington and not in St. Louis. This view is fatal to the jurisdiction of the Court in St. Louis as respects the checks, and this irrespective of the question whether under the endorsement and delivery to the Riggs Bank and the giving of the defendant credit therefor, the Riggs Bank became the mere agent of Burton to collect or became the owner of the check. These are questions between the Riggs bank and its indorsees and not between Burton and the Rialto Company.

(*c*) But if the question of agency or ownership were material in this case, then under the stipulated and undisputed facts we make the following proposition, and we state it in the language of the defendant's 10th and 11th instructions which were *refused* by the Court (p. 244), who laid down the contrary to the jury in its charge.

The said 10th and 11th instructions asked by the defendant and *refused* (p. 244) are as follows:

"(10) If the checks of the Rialto Grain and Securities Company, described in the indictment, were sent to the defendant, and received by him in the City of Washington, D. C., and were by him deposited in the Riggs National Bank in Washington, and the bank gave him credit for the amount of such checks as the same were deposited respectively, and the defendant had the right at once to check against the same and to draw out such money from the bank and the bank sent the checks to St. Louis and presented them for payment, and they were paid, then the jury are instructed that the checks and the money thereon were received by the defendant in the City of Washington."

"(11) The jury are instructed, that after the defendant endorsed the checks in question to the Riggs National Bank of Washington, D. C., and had received credit, in his account with the bank for the amount of such checks, the checks became the property of the bank, and the bank had the right to do with the checks whatsoever it would, and it was under no obligation to account to the defendant for said checks or their proceeds."

The checks were negotiable paper payable on demand to Burton or order. They were endorsed in blank by Burton without any qualification or restriction and delivered to the Riggs Bank. The Riggs Bank gave Burton immediate credit for the amount, and the *title* to the check thus endorsed, delivered and paid for clearly passed to the bank, just as much as if the bank had delivered Burton over its counter bank bills for the amount. The Riggs Bank became in law a debtor to Burton for the amount, which Burton had the right to check out immediately. Such was the contract. The rights of Burton and the bank became irrevocably fixed when the check was thus endorsed and delivered to the bank and credit taken for it. The relation thus created was that of debtor and creditor, not that of agent and principal. (See authorities on this subject,

ante, pp. 128 *et seq.)*. The legal effect of the endorsement and credit irrevocably fixed the relations and rights of the parties. There is nothing in the proofs to control this legal effect even if parol evidence to that end were competent. But no such evidence was offered.

The endorsement and delivery of the checks to the Riggs Bank transferred to the bank the legal title to the checks. The giving of Burton credit with right to draw was the consideration for which the bank acquired the checks. That credit was availed of and never canceled and the right to cancel it never existed or arose. The bank had no power to cancel it except upon the single condition that the checks were subsequently dishonored. That event never happened. On the contrary the checks were duly paid on presentment.

Let it be noted that the right to cancel the credit in case of the dishonor of the checks was not a condition attaching to or qualifying the bank's title to the checks, not a *condition precedent* to the bank acquiring title, but it was a right *plus* the bank's title, a right collateral to such title and superadded to it, and not in any way in derogation of the bank's title to the checks.

When, therefore, payment of the checks which it had thus acquired was received the *money* so received was the money of the owner or holder of the checks and not Burton's. A decisive test of this is that if Burton had sued the Riggs bank for the money thus received on the checks, the action would have failed for want of title in Burton. How then can it be said the money received on the checks was Burton's money? The right of the bank in case of the dishonor of the checks to cancel the credit does not impair or qualify the title of the bank to the checks.

If it had paid Burton cash over its counter for the checks, and they were afterwards dishonored, the bank would have the right under the usage proved to charge Burton's account with the amount of the checks just

the same as it would have if it credited to Burton the amount of the checks. Burton's liability as endorser would have been sufficient for this.

It follows that every proposition laid down in the Court's charge as to these checks was erroneous.

Thus, the Court ought not to have charged that the jury might find that the Riggs bank was the *mere agent* of Burton, and, if so, the money paid on the checks was paid to Burton in St. Louis.

The Court also erred in charging that the jury might find that the checks were the property of Burton after the endorsement and transfer to the bank, and in allowing the jury to decide that unless they found that the bank was the "*absolute owner*" of the checks, then the checks belonged to Burton and the payment of the checks in St. Louis was in law the same as a payment to Burton in person in St. Louis.

The converse of these erroneous principles laid down by the Court in its charge was asserted in the 10th and 11th instructions asked by the defendant (p. 244). These were erroneously *refused* by the Court and exception duly taken.

4.

In respect of the checks and of the jurisdiction of the Court in St. Louis, we make the further distinct point that even if the Court rightly refused the 10th and 11th instructions asked by the defendant, and even if the Court did not err in submitting to the jury the question whether as respects the checks the Riggs bank was the mere agent of Burton to collect the same, or whether that bank became the absolute owner of the checks, and even if the jury were justified in finding that the Riggs bank was such agent, still the Court erred in its direction to the jury (p. 237) that

"then the final payment by the Commonwealth Trust Company at St. Louis of the check to the correspondents of the Washington (Riggs) bank, *would*

amount in law to a payment in St. Louis as charged in the 6th count, of the amount of the check to the accused; and that the issues with respect to the 7th, 8th and 9th counts are the same as the issue made by the 6th count with respect to the check therein involved" (pp. 237, 238).

The defendant asked the Court for instructions to return a verdict of not guilty as to counts 6, 7, 8 and 9, based on *the checks, which instructions* were refused and exceptions taken (p. 165, also p. 229).

These instructions ought to have been given, for it is plain and established law that where there is no proof of *venue* the Court should direct an acquittal. It was error to refuse them.

Stone vs. State, 105 Ala., 60.
Randolph vs. State, 100 Ala., 139.
Justice vs. State, 99 Ala., 180.
Childs vs. State, 55 Ala., 28.
Clark vs. State, 46 Ala., 307.

Under the Court's charge the jury rendered the following verdict (p. 24):

"We, the jury, find the defendant guilty as charged in counts one (1), two (2), six (6), seven (7), eight (8) and nine (9) of the indictment, and not guilty as charged in count three (3)"; counts four and five were *nolled.*

On this verdict the Court rendered judgment and sentence of fine and imprisonment (p. 25).

It is an immemorially established principle of the common law that an indictment can be found in that county only in which the crime has been committed.

Stephen, Dig. Law Crim. Proc., 47.
Rex vs. Jones, 6 C. & P., 137; 4 Black. Com., 303; 1 Chitty Crim. Law, 189; 2 Hale P. C., 163; 2 Hawk. P. C., Ch., 25, Secs. 24, 35, 51.

This common law principle as to the local jurisdiction in respect of criminal offenses was adopted by the Constitution of the United States, substituting "State" and "State and district" for county.

The Constitution of the United States provides that

" The trial of *all crimes*, except in cases of impeachment, shall be by jury; and such trial *shall* be held in the *State* where the said crimes shall have been committed, &c." (Const. U. S., Art. III., Sec. 2, Clause 3)[1]

But the Sixth Amendment to the Constitution is more specific, viz., that

" in all criminal prosecutions the trial shall be by an impartial jury of the *State and district* wherein the crime shall have been committed, which shall have been previously ascertained by law."[2]

Such " provisions are strictly construed in favor of the accused, and with a recognition of the principles

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[1]Commenting upon this section of the Constitution Mr Justice STORY says:

" It is observable that the trial of all crimes is not only to be by jury, but to be held in the *State*, where they are committed. The object of this clause is to secure the party accused from being dragged to a trial in some distant State, away from his friends and witnesses and neighborhood; and thus to be subjected to the verdict of mere strangers who may feel no common sympathy, or who may even cherish animosities or prejudices against him. Besides this, a trial in a distant state or territory might subject the party to the most oppressive expenses, or perhaps even to the inability of procuring the proper witnesses to establish his innocence."—Story's Commentaries on the Constitution, Vol. III., Ch. XXXVIII., Sec. 1775.

[2]Commenting on the clause of the Sixth Amendment Judge TUCKER says:

" The trial must not only be by a jury of the State, but of the district wherein the crime shall have been committed, which district shall have been previously ascertained by law. This is intended to prevent the choice of a jury from a district provided by *ex post facto* legislation, and which might thus do a great injustice to the accused."

2 Tucker, Const. U. S., 678-680.

In Callan vs. Wilson, 127 U. S., 540, the provision that the trial of all crimes shall be by jury was held to mean not only felonies, but misdemeanors involving deprivation of liberty, and that these provisions are in force in the District of Columbia.

of the common law, and the Legislature cannot authorize a trial in any other place."

12 Cyclopædia of Law and Procedure, title Criminal Law, pp. 229, 230, and many cases there cited.

Congress has provided (Revised Statutes, Section 731) that

"When any offense against the United States is begun in one judicial circuit and completed in another, it shall be deemed to have been committed in either, and may be dealt with, inquired of, tried, determined and punished in either district, in the same manner as if it had been actually and wholly committed therein."

We have shown above that this Section 731 has no application to the present case, because not only were the defendant's alleged services wholly rendered in Washington, but the compensation represented by the checks was received by the defendant in Washington, and, therefore, if the facts showed any offense against Section 1782, Revised Statutes, upon which the indictment is founded, such offense was not only "begun" but was "completed" in Washington, and, if so, then under the Constitution the defendant could not be tried in St. Louis.

To support the jurisdiction of the court in St. Louis it is necessary to hold, as the Court below did hold, that the alleged offense was only *begun* in Washington, and that the same was not *completed* until the actual receipt of the *money* on the checks in St. Louis, and the Court charged the jury that payment to the correspondent of the Riggs Bank in St. Louis was the same in law as if the money had been paid to Burton in person in St. Louis, unless the Riggs Bank was the absolute owner of the checks.

We deny, on the express decisions of this and other Courts (cited *ante*, p. 128), the soundness of this proposition even on the assumption that the Riggs Bank or

its indorsee Riggs Bank was not the owner of the checks but was the agent of Burton to collect the checks.

In short, the Court held that although Burton was *actually absent* from St. Louis, yet he might be *constructively present* by reason of the payment of the *money* on the checks in St. Louis to the transferees of the Riggs Bank, and the Court also charged that in law the defendant was present in person in St. Louis when the money on the checks was paid, "if the Riggs Bank had not become the *absolute owner* of the checks," the Court erroneously leaving it to the jury to decide whether or not the Riggs Bank was such owner.

Further as to the Doctrine of Constructive Presence.

This doctrine of *imputed or constructive presence* in the alleged locality of the crime, although the accused was *in fact absent*, is, we insist, in direct conflict with the Constitution (Art. III., Sec. 1) and the Sixth Amendment securing to the defendant "the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed."

The ruling of the Court below (if it should be deemed correct in holding that the Riggs Bank and the subsequent indorsees were *agents* of Burton, which we deny) calls upon this Court to decide whether the odious doctrine of *constructive criminality* reprobated and stamped out in England has still a place in our system of law and jurisprudence; whether crime has a locality and a person accused has a right to be tried in the place where the acts constituting the alleged crime were committed; whether the offense charged against the defendant is *ambulatory* and is committed in Chicago, London, San Francisco or St. Louis, depending upon the accident where a particular draft or check is payable, or is paid, and whether it

can be committed in a distant jurisdiction through the fiction of an *imputed and constructive agency.*

Why did the Constitution erect the bulwark of personal liberty provided for in the Constitution and in the Sixth Amendment that every person accused of crime should enjoy the right of *trial* by a jury *in the State and district where the crime was committed?* It was because it was deemed essential to justice that no man ought to be triable or tried except in the place where the acts constituting the crime were actually committed; where the character of the prosecutor and of the accused as well as of the witnesses are known, and where the attendance of witnesses for his defense can be enforced. In a country of such vast geographical extent as ours, this established principle of the law of England as to the locality of crime and of criminal jurisdiction was considered of such prime and fundamental importance to the liberty of the citizen that it ought to be safe-guarded by the Constitution itself, and the people of this country were not satisfied until this great bulwark of justice and of individual right and liberty was further secured by the specific provisions of the Sixth Amendment to the Constitution.

Section 731, Rev. St., *supra*, is a transcript of the Act of 7 Geo., IV., c. 64, sec. 12, which provides that where an offense "is begun in one county and completed in another the offender may be tried in any of such counties, as for example, a wound in one county and death in another."

Stephen, Digest Crim. Procedure, p. 47 and note, citing R. vs. Jones, 1 Russell on Crimes, p. 8.

The statute on its face is limited to cases "where some of the acts material and essential to the crime and requisite to its consummation occur in one county and some in the other, in which case the accused is indictable in either."

12 Cycl. Law & Proc., *supra*, pp. 239, 240.

Under the Court's view the actual

"receipt of the *money* represented by the checks is the gist of the crime charged against the accused, and if he did not receive it in this district [St. Louis] he is not amenable to law in this district" (p. 236).

And thus the locality of the offense and of the Court's jurisdiction is made to depend upon the place where the *money* called for by the checks received in compensation for the alleged prohibited services is actually collected on the checks. Under this view the crime has no fixed locality or jurisdiction, but the offense is *ambulatory* or *peripatetic*. If the first check had been drawn on St. Louis, the second on Chicago, the third on New York, the fourth on Philadelphia, and each had been collected in those several cities, what would be the locality of the offense? Would the jurisdiction for trial be in each or all, or which?

Suppose the checks in question in this case had been drawn upon London or Montreal, and the *money* thereon collected in those places, then according to the Court's view there would be no completed crime at all against the laws of the United States, for the offense would not be one, which, in the language of Section 731 was "begun in one judicial circuit and completed in another."

The true view we submit is the one maintained above that the checks were received and disposed of by Burton in Washington, and that compensation was received when the checks were received by Burton as compensation, and disposed of by him to the Riggs Bank. On this point the authorities above cited are conclusive (*Ante*, pp. 128, 133).

THE DOCTRINE OF CONSTRUCTIVE PRESENCE underwent the most exhaustive examination to which it was ever subjected, by Chief Justice MARSHALL in the *United States vs. Aaron Burr*. It was the turning point of the case. It was discussed at the bar for days by law-

yers eminent for ability and learning as will be seen by Robertson's shorthand report of the trial. MARSHALL'S great opinion in that case has, so far as we know, never been questioned. It is given in full in *Robertson's Report;* also in the *Appendix* to 4 Cranch's Reports, and also in MARSHALL'S *Complete Constitutional Decisions* (by John M. Dillon, pp. 82–165).

The indictment charged Burr with treason, alleging as the overt act that he levied war on Blennerhassett's Island in the State of Virginia. The indictment was found and the trial took place in the United States Circuit Court for Virginia.

At the time of the assemblage of men on Blennerhassett's Island, Burr was two hundred miles distant in another Federal district and State. It was held that the indictment "could not be supported by proof that war was levied at that place (Blennerhassett's Island) by other persons, in the *absence* of the prisoner, even admitting those persons to be connected with him in one common treasonable conspiracy."

Chief Justice MARSHALL in his opinion says:

"The place in which a crime is committed is essential to an indictment, were it only to show the jurisdiction of the Court. It is also essential for the purpose of enabling the prisoner to make his defense. That at common law an indictment would have been defective which did not mention the place in which the crime was committed, can scarcely be doubted. For this it is sufficient to refer to Hawkins, V. 2, c. 25, § 84, and c. 23, § 91. This necessity is rendered the stronger by the constitutional provision that the offender 'shall be tried in the State and district wherein the crime shall have been committed,' and by the Act of Congress which requires that twelve petty jurors, at least, shall be summoned from the county where the offense was committed.

"A description of the particular manner in which the war was levied seems also essential, to enable the accused to make his defense. The law does not expect a man to be prepared to defend every act of his life which may be suddenly and without notice alleged against him. In common justice, the particular fact with which he is charged ought to be stated, and

stated in such a manner as to afford a reasonable certainty of the nature of the accusation, and the circumstances which will be adduced against him. * * *

"That clause in the Constitution, too, which says that in all criminal prosecutions the accused shall enjoy the right 'to be informed of the nature and cause of the accusation,' is considered as having a direct bearing on this point. It secures to him such information as will enable him to prepare for his defense. It seems, then, to be perfectly clear that it would not be sufficient for an indictment to allege generally that the accused had levied war against the United States. The charge must be more particularly specified, by laying what is termed an overt act of levying war. The law relative to an appeal, as cited from Stamford, is strongly corroborative of this opinion. *If it be necessary to specify the charge in the indictment, it would seem to follow, irresistibly, that the charge must be proved as laid.*

"All the authorities which require an overt act require also that this overt act should be proved. The decision in Vaughan's case is particularly in point. *Might it be otherwise, the charge of an overt act would be a mischief instead of an advantage to the accused. It would lead him from the true cause and nature of the accusation, instead of informing him respecting it.*

"But it is contended on the part of the prosecution that, although the accused had never been with the party which assembled at Blennerhassett's Island, and was at the time at a great distance, and in a different State, he was yet legally present, and, therefore, may properly be charged in the indictment as being present in fact. It is, therefore, necessary to inquire whether *in this case the doctrine of constructive presence can apply.* * * *

"If such evidence would support such an indictment, by *the fiction that he was legally present, though really absent*, all would ask, To what purpose are those provisions in the Constitution which direct the place of trial and ordain that the accused shall be informed of the nature and cause of the accusation?" * * *

And because Burr was actually absent and could not under the circumstances be considered as constructively present the prosecution failed for want of jurisdiction in the Circuit Court for Virginia and Burr was acquitted.

We make, for the foregoing reasons, the distinct point that Section 731 of the Revised Statutes, as construed and applied by the Court below to the facts of this case against Senator Burton would make that section conflict with Article III., Section 2 of the Constitution and with the Sixth Amendment, which gives the defendant the *right* to be tried in the State or district in which the crime alleged against him was committed. The doctrine sanctioned and applied by the trial Court, that the defendant was *constructively present* in St. Louis though *actually absent*, and that therefore the offense was "completed" in St. Louis, and under Section 731, Revised Statutes, could be tried in St. Louis is, as thus applied, in violation of the above provisions of the Constitution in respect of the locality of the crime and the local jurisdiction of the Court before which the crime must be tried.

The common sense view of the case made on the trial of the defendant Burton, and the only one consistent with the Constitution and with sound legal principles is, we submit, the view that if the services rendered by Burton were prohibited services (which we have clearly shown they were not), and if the checks represented compensation for prohibited services (which we dispute), and if they were received therefor by Burton in Washington and endorsed and delivered, as shown to the Riggs Bank, then, under the Constitution of the United States (Art. III., Sec. 2), and the Sixth Amendment, the offenses based on the checks were committed, if at all, in Washington, and the Court in St. Louis had no jurisdiction over them.

Result as to the Checks Stated.

If as to the 6th, 7th, 8th and 9th counts based on the checks the Court in St. Louis had no jurisdiction, the result is that the judgment below must be wholly reversed for the following reasons:

1st. Because in this event the voluminous testimony offered by the government in respect of the transactions represented by these checks was incompetent and its admission (which was over the objections and exceptions of the defendant) was erroneous, and such testimony was necessarily prejudicial to the defendant. The defendant had the plain, legal right to have testimony relating to alleged offenses over which the Court had no jurisdiction excluded from the consideration of the jury. The "services" alleged to be represented by those checks the Court charged the jury they might consider, and they did consider the same in rendering their verdict.

2d. Because the judgment and sentence of the Court *was rendered upon and included punishment* for the offenses charged in the 6th, 7th, 8th and 9th counts—that is to say, for offenses over which the Court in St. Louis had no jurisdiction.

The record plainly shows that such punishment was included in the sentence of the Court, since the Court held throughout that the 1st and 2d counts (based upon the payment of $500 March 26) charged one offense, and counts 6, 7, 8 and 9 (based upon the checks) *each* charged a separate and distinct offense.

The Court so ruled on the *trial* on the motion of the defendant to compel "the prosecution to elect upon which counts it will further proceed" (pp. 165, 166). The Court refused this motion saying (p. 166):

"The receipt of $500 at one time for services, if they were rendered, before the P. O. Department would constitute *an offense in and of itself; so the receipt of another $500 would be an offense in and of itself.* That is the view I take of it.

JUDGE KRUM (for defendant): Then the view of the Court is that the counts which cover the receipt of the checks, and the proceeds of these checks *state separate and distinct offenses?*

THE COURT: Yes, I think so" (p. 167).

The same view was taken when counts 4 and 5 were *nolled* (pp. 22, 233).

Also when the Court directed the jury

" that if there was a verdict of guilty on the 1st or 2d counts there should be no conviction on the 3d count because, as already stated, it is but another way of charging *the same offense as is charged in the 1st and 2d counts*" (p. 235); which direction the jury followed in their verdict" (p. 24).

So, also, in the *charge* of the Court throughout. Thus the Court says:

" The 6th count relates to a transaction different from that involved in the first three counts" (p. 235).

So, also, the *verdict* (p. 24):

" We, the jury, find the defendant guilty as charged upon counts 1, 2, 6, 7, 8 and 9, and not guilty in count 3."

OBSERVE, that this verdict is not a general verdict, but specific as to each count.

So in the *judgment and sentence* of the Court (pp. 25, 26), in which it is stated that

" thereupon the said District Attorney asks the judgment and sentence of the Court upon the verdict of guilty heretofore returned by the jury to the charges *as contained in the 1st, 2d, 6th, 7th, 8th and 9th counts of the indictment herein*" (p. 25).

And the Court accordingly rendered judgment and sentence of fine and imprisonment upon the said verdict and all of the said counts *including the 6th, 7th, 8th and 9th counts upon the checks* (pp. 25, 26).

In view of the foregoing record, it is clear that the Court included in its sentence punishment for the four

" separate and distinct offenses," as it termed those represented by the four checks upon which the 6th, 7th, 8th and 9th counts were based. And it cannot be supposed that the Court would have imposed the same measure of punishment upon *one* offense as it would and did upon what it held to be *five* " separate and distinct " offenses.

It seems hardly necessary to observe that this is not a case where, upon a general verdict of guilty upon an indictment containing several counts stating the same offense in various forms, some of which counts are good and some bad, judgment may be pronounced upon or in proper cases referred to the good counts if the allegations therein are sustained by the evidence. On the contrary, this is a case where the verdict is *specific* and *not general* and where it *affirmatively appears* that the judgment and sentence pronounced by the Court were rendered upon *all* the counts, including those upon the checks, and where such judgment and sentence included punishment for the supposed " separate and distinct offenses " charged in the several counts based upon the checks, over which offenses the Court had no jurisdiction.

IV.

RE THE PAYMENT OF MARCH 26, 1903.

No services whatever were performed by Senator Burton before the Post Office Department for the month's salary which was handed to him in cash in St. Louis on or about March 26, 1903; and as two things are necessary to constitute an offense under the statute, namely, (1) services as well as (2) payment for the services, there was no evidence to go to the jury of any offense committed by Senator Burton in St. Louis or elsewhere, in respect of the said payment of March 26.

When the checks of December 15, January 22 and February 16, respectively, and also the payment of $500 on March 26th was offered to be proved, objection was made and exception taken by the defendant on the ground that, as respects said $500 payment in cash, there was no evidence at all of any services rendered by the defendant in the Post Office Department to which the receipt of such payment could be made applicable. (See as to check December 15, 1902, record, p. 103, 104; as to check January 22, 1903, record, p. 109; as to check of February 16, 1903, record, p. 112; and as to the $500 cash payment, record, p. 118.)

These objections and exceptions in respect of each of these checks and of this $500 payment were, respectively, overruled by the court, and the evidence of the giving of these checks and the payment of said $500 was admitted in evidence, notwithstanding there was an utter failure to prove the charge of the indictment—namely, that for these payments, respectively, Senator Burton rendered services to the Rialto Grain and Se-

curities Company before the Post Office Department to prevent the issue of a fraud order.

As the payments by the four checks were not made in St. Louis but in Washington, and as the prohibited services (if any prohibited services were performed, which we deny) were not performed in St. Louis but in Washington, the crimes alleged in receiving payment by these four checks and in performing the services for which it is alleged these four payments were made, were not either "begun" or "completed" in St. Louis, and therefore the trial court in St. Louis had no jurisdiction to entertain a criminal prosecution for the crimes alleged in receiving payment by these four checks and in performing the services for which the prosecution claims these four checks were compensation. Therefore the trial Court should not have considered or submitted to the jury any evidence as to these four checks or as to the alleged services for which these four checks were payment.

Senator Burton's contract of employment was that he should receive $500 per month for his services (Harlan's Testimony, Record, page 173; Burton's Testimony, Record, pages 215, 216). There was a proviso added to this contract at the suggestion of Senator Burton, in order that the employment might last long enough to make it worth while for him to take it up. Mr. Harlan states this in his testimony as follows (page 173):

"He [Senator Burton] said, 'Of course I do not want to get cut off at the end of one month.' 'For instance'—I am now using his language as near as I can—'I don't want to go down there to St. Louis and help you in the trial of that case [the Dennis indictment] should there be an indictment, and have my salary cut off at the end of that month.' So one or other of us—I do not remember which one of us—suggested five months. At any rate, whichever one of us suggested it, that was acceptable."

The contract was, therefore, that the compensation should be $500 a month, with the proviso that the employment should continue not less than five months.

Mr. Kastor in his testimony mentioned the sum of $2,500. He said (Record, page 81):

"I think there was something stated about $2,500 being paid to him."

"JUDGE CRUM: What is that? A. About the Senator receiving $2,500, and I think it was arranged to have it paid at different periods. That is not so clear in my mind."

Doubtless Mr. Kastor had in mind $2,500 because the employment was to continue not less than five months, which would make not less than $2,500. He states, however, that his recollection is "not so clear," and naturally it would not be, as Mr. Kastor was not a party to the contract and was not to pay the money or receive the money. But Mr. Harlan, who made the contract on behalf of Mr. Dennis and the Rialto Grain and Securities Company, and Senator Burton, both testified unequivocally that the compensation was to be $500 per month. This statement of the contract is made conclusive by Senator Burton's first letter, dated November 20, 1902, written when the conversation and agreement between him and Harlan were fresh in his mind (Record, p. 94): "You may make remittance *for my first month's pay*"; and by Harlan's letter to Burton, dated November 22, 1902, written also when the matter was fresh in Mr. Harlan's mind, in which he says (Record, page 175): "I enclose the company's check for $500 as per agreement. This check should have been sent in my former communication [letter of November 18, 1902, Record, page 91], but I neglected to do so." And again in Burton's letter to Harlan, dated February 11, 1903 (Record, p. 139), Burton mentions his next "*month's pay.*" This fact is further confirmed by the testimony of Mr. Mahaney, vice-president of the Rialto Grain and Securities Company, who was called as a witness on behalf of the United States (Record, page 132):

"Q. Your understanding was that he was on a salary of $500 a month, was it? A. Yes, sir, that is what I was told by Mr. Harlan."

The contract therefore was that the compensation was to be $500 per month and that the employment was to continue for at least five months.

Under this contract Burton received his "first month's pay" by check dated *November* 22, 1902 (Record, page 102), transmitted in letter of Harlan of same date (Record, page 175), the payments under the contract being made in advance, and this payment was for the month from November 18 to December 15 or 18, 1902. By mutual consent, the beginning of the period for the monthly payments was changed to the 15th of the month instead of the 18th (Harlan's Testimony, Record, pages 188, 189).

The next month's pay was made by check dated *December* 15, 1902 (Record, page 104), and this was for salary for the month beginning December 15 or December 18, 1902.

The next month's pay was made by check dated *January* 22, 1903 (Record, page 112), and this payment was for salary for the month beginning January 15 or January 18, 1903.

The next month's pay was made by check dated *February* 16, 1903, and was for salary for the month beginning February 15 or February 18, 1903.

The next month's pay was made in cash in St. Louis, and was made March 26, 1903, or thereabouts (see Cash Check, Record, page 117), and was *for the month beginning March 15 or March 18, 1903, and ending April 15 or April 18, 1903.*

If there were any prohibited services rendered by Burton (which we deny), these services were all of them rendered before February 27, 1903, the date of the last telegram between Mahaney and Burton (see Record, page 128; this Brief, page 112). The date of the last interview or communication which Senator Burton had with any official in the Post-office Department was February 5, 1903 (see Cochran's Testimony, Record, page 143; this Brief, page 74). There was absolutely no evidence whatsoever of any services rendered by Senator Burton to the Rialto Grain and Se-

curities Company or to Dennis before the Post-office Department, after February 27, 1903.

The check dated *November* 22, 1902, was the "month's pay" for the month's services beginning November 18, 1902, and ending December 18 or 15, 1902; the check dated *December* 15, 1902, was the "month's pay" for the month's services beginning December 15 or 18, 1902, and ending January 15 or 18, 1903; the check dated *January* 22, 1903, was the "month's pay" for the month's services beginning January 15 or 18, 1903, and ending February 15 or 18, 1903; the check dated *February* 16, 1903, was the "month's pay" for the month's services beginning February 15 or 18, 1903, and ending March 15 or 18, 1903; and the cash payment made in St. Louis on or about March 26, 1903, was the "month's pay" under the contract for the month's services beginning March 15 or 18, 1903, and ending April 15 or 18, 1903.

During this month, March 15 or 18, to April 15 or 18, 1903, for which the month's pay of $500 was made in cash to Senator Burton, no services whatsoever before the Post Office Department were performed by Senator Burton for the Rialto Grain and Securities Company, and there is absolutely no evidence whatsoever showing or tending to show any such services during that month, nor any such services whatsoever after February 27, 1903. On the contrary the evidence shows affirmatively that there were no such services.

There can be no doubt that each month's pay was for each month's services. Suppose, for example, that at the end of the second month's service, say January 15 or 18, 1903, Senator Burton had died; his executor could not for a moment maintain a claim that any further payment would be due; and if in such event the executor had sued for any subsequent month's pay, it would have been a complete answer to say that no services were rendered for the month for which the suit was brought. The contract was for $500 per month, that is, that Senator Burton should perform services

or be ready to perform and capable of performing services each month for the pay received for that month. Suppose Senator Burton had died March 1st, after all the alleged services before the Post Office Department had been performed, and suppose that on March 15 or 18, his executor had sued the Rialto Grain and Securities Company for compensation for the month from March 15 or 18 to April 15 or 18, and had set up in the complaint that Senator Burton in November, 1902, performed certain services for the Rialto Grain and Securities Company before the Post Office Department, and asked to have a judgment for the month's pay of $500 for the month beginning March 15 or 18, 1903, *as compensation for the services rendered in November*, 1902, a complete answer would be that those November services were paid for in the check dated November 22, 1902. The same thing would be true as to any services rendered in December, 1902, and January and February, 1903.

This shows conclusively that the $500 cash paid in St. Louis in March, 1903, was *not payment for any services rendered by Burton before the Post Office Department* (all of which were ended by February 27, 1903 at the latest), but that the $500 cash paid in St. Louis was the monthly salary paid under the contract for services which Burton performed or stood ready to perform for the Rialto Grain and Securities Company for the month beginning March 15 or 18, 1903. It was a month's pay due under the contract *for that month*, and was not payment for any services before the Post Office Department.

Government's Case Wholly Failed, and Court Should Have Directed a Verdict of Not Guilty.

There was, therefore, no evidence to go to the jury of any offense under the statute committed by Senator Burton. The payments by the four checks and all the

services for which those four checks were payment (even if any prohibited services were performed, which we deny), are all out of the case, because neither any such services were performed nor any such payments by the four checks were made in St. Louis; and, although the month's pay given to Senator Burton on or about March 26, 1903, was given to him in cash in St. Louis, there was no evidence to prove any services whatsoever by Burton before the Post-office Department in the month for which this payment was made, and, therefore, one of the two elements necessary to constitute an offense under Section 1782 of the Statutes is entirely wanting.

Hence, the Court erred in submitting the case to the jury at all, either as to the checks and services for which they respectively were payment or as to the payment made in cash in St. Louis, there being no prohibited services proved for which said cash was payment.

The first, second, third, fourth and fifth counts in the indictment are all based on the said payment made in St. Louis on the 26th day of March, 1903. Before the trial the fourth and fifth counts were *nolled* by the District Attorney with the consent of the Court (Record, pp. 22, 27 and 233). By direction of the Court a verdict of not guilty was rendered as to the third count, leaving standing, as respects the said payment of March 26, 1903, counts one and two (Record, p. 235).

At the close of the Government's case, the defendant asked that the following instructions be given to the jury—to wit : To return a verdict of not guilty as to Count One in the indictment ; to return a verdict of not guilty as to Count Two in the indictment ; to return a verdict of not guilty as to Count Three in the indictment. The Court granted the said motion as to Count Three, but refused the same as to Counts One and Two, to which ruling the defendant duly excepted at the time (Record, p. 165).

At the close of the testimony the defendant again

asked the Court as to each count in the indictment to direct the jury to return a verdict of not guilty, which the Court refused as to each of said counts, to which ruling the defendant then and there duly excepted (Record, p. 229).

The Court ought to have granted the said motions of the defendant as to said Counts One and Two, for the reason above fully stated, that there was no proof whatever that any services, of any character whatever, were rendered by Senator Burton in the department in respect of which the said payment of $500, March 26, 1903, was made. Furthermore, the evidence affirmatively showed that no such services were rendered by the defendant before the department (Record, pp. 221, 223.)

The Court also erred in its charge on this subject in instructing the jury (Record, pp. 234, bottom, and 235, top) that if the defendant received this $500 in St. Louis

" for services of the kind set forth in the counts [One and Two] *on any days between November 22, 1902, and March 26, 1903*, rendered by him for the Company before the Department in the matter of that inquiry [to-wit, whether a fraud order should issue], then it will be your duty to find the defendant guilty as charged in the First and Second counts of the indictment."

That is to say, under the doctrine of the Court's charge, if any prohibited services were rendered in *November, 1902*, for which payment had already been received by check for that month, and *for which the $500 cash was not payment*, still, under the Court's charge, the jury were bound to convict Senator Burton under Counts One and Two of the indictment.

V.

The Court Erred in Trying the Defendant, a Senator of the United States, When the Senate Was in Session, and Also in Pronouncing Judgment and Sentence of Fine and Imprisonment Against Him, To Be Executed at a time When the Senate Was in Session.

The Constitution of the United States provides, as respects the privilege of Congress, *inter alia*, as follows:

"They (the Senators and Representatives) shall in *all cases* except treason, felony and breach of the peace, be privileged from arrest during their attendance at the session of their respective houses, and in going to and returning from the same."

Const., Art. I., Sec. 6

Mr. Justice STORY'S commentaries on this provision of the Constitution are given in the margin.[1]

The defendant was indicted January 23, 1904 (p. 19). The statute designates the alleged offense as a "misdemeanor." Without capias being served, the defendant appeared in court in person and by attorney January 27, 1904 (p. 19). The record shows that from the time of such appearance the defendant was under the *orders*

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[1] Story Com. Const. Book III., Ch. XII.

"§ 856. The next part of the clause regards the privilege of the members from arrest, except for crimes during their attendance at the sessions of Congress, and their going to or returning from them. This privilege is conceded by law to the humblest suitor and witness in a court of justice; and it would be strange, indeed, if it were denied to the highest functionaries of the State in the discharge of their public duties. It belongs to Congress in common with all other legislative bodies which exist, or have existed, in America since its first settlement under every variety of government; and it has immemorially constituted a privilege of both

of the Court which, if valid, restrained his freedom and power to perform his senatorial duties, the Senate being then in session (pp. 19, 20, 22–26).

The record does not show that the defendant set up his constitutional immunity from arrest or imprisonment until his motion in arrest of judgment March 29, 1904 (Rec., p. 278).

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houses of the British Parliament.[1] It seems absolutely indispensible for the just exercise of the legislative power in every nation purporting to possess a free constitution of government, and it cannot be surrendered without endangering the public liberties as well as the private independence of the members."[2]

"§ 857. This privilege from arrest, privileges them of course against all process, the disobedience to which is punishable by attachment of the person, such as a *subpœna ad respondendum, aut testificandum*, or a summons to serve on a jury; and (as has been justly observed) with reason, because a member has superior duties to perform in another place. **When a representative is withdrawn from his seat by a summons, the people, whom he represents, lose their voice in debate and vote, as they do in his voluntary absence. When a senator is withdrawn by summons, his State loses half its voice in debate and vote, as it does in his voluntary absence. The enormous disparity of the evil admits of no comparison.[3] The privilege, indeed, is deemed not merely the privilege of the member, or his constituents, but the privilege of the house also. And every man must at his peril take notice, who are the members of the house returned of record."**[4]

§ 860. **"The effect of this privilege is, that the arrest of the member is unlawful, and a trespass ab initio, for which he may maintain an action, or proceed against the aggressor by way of indictment. He may also be discharged by motion to a court of justice, or upon a writ of habeas corpus;[5] and the**

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[1] Black. Comm., 164, 165; Com. Dig. *Parliament*, D. 17; Jefferson's Manual, § 3, *Privilege; Benyon vs. Evelyn*, Sir O. Bridg. R., 334.

[2] 1 Kent Comm., Sect. 11, p. 221; *Bolton vs. Martin*, 1 Dall. R., 296; *Coffin vs. Coffin*, 4 Mass. R., 1.

[3] Jefferson's Manual, § 3.

[4] *Id.*, § 3.

[5] Jefferson's Manual, § 3, 2 Str., 990; 2 Wilson's R., 151; Cas. Temp. Hard., 28.

We make the following points:

1. That, as the defendant's immunity from arrest is not personal, but belongs to the office of Senator for the benefit of the Government, the State of Kansas and of his constituents, the de-

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arrest may also be punished, as a contempt of the house."[1]

§ 862. "The exception to the privilege is, that it shall not extend to 'treason, felony, or breach of the peace.' These words are the same as those in which the exception to the privilege of parliament is usually expressed at the common law, and it was doubtless borrowed from that source.[2] Now, as all crimes are offences against the peace, the phrase 'breach of the peace' would seem to extend to all indictable offences, as well those, which are, in fact, attended with force and violence, as those which are only constructive breaches of the peace of the government, inasmuch as they violate its good order.[3]

And so in truth it was decided in parliament, in case of a seditious libel, published by a member (Mr. Wilkes), against the opinion of Lord CAMDEN and the other judges of the Court of Common Pleas;[4] and, as it will probably now be thought, since the party spirit of those times has subsided, with entire good sense, and in furtherance of public justice.[5] It would be monstrous, that any member should protect himself from arrest, or punishment for a libel, often a crime of the deepest malignity and mischief, while he would be liable to arrest, for the pettiest assault, or the most insignificant breach of the peace."

Paterson, Liberty of the Subject, Vol. I., p. 193, refers to the later cases of Butt vs. Conant, 1 B. & B., 548, and Haylock vs. Sparke, and says: "That it must always be a question of fact whether a libel tends to a breach of the peace. The utmost length, therefore, that a court can fairly go is to hold that in some instances, according to the virulence of the libel, the libeller may be called on to give surety of the peace, but not necessarily so in all cases."

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[1] 1 Black. Comm., 164, 165, 166; Com. Dig., *Parliament*, D., 17; Jefferson's Manual, § 3.

[2] 4 Inst., 25; 1 Black. Comm., 165; Com. Dig., *Parliament*, D., 17;

[3] 1 Black. Comm., 166.

[4] *Rex v. Wilkes*, 2 Wilson's R., 151.

[5] See 1 Black. Comm., 166, 167.

fendant could not waive it, even if he had consented or attempted to do so. The record shows no such waiver in fact or in law, and the Court had no power to *try* the cause while the Senate was in session.

2. The defendant's supposed waiver, whatever its legal effect, could, in any event, extend no further than the period during which the defendant failed to set up his constitutional immunity, and after March 29, 1904, the Court had no power to pronounce the judgment and sentence of April 6, 1904 (p. 25), the Senate being then in session.

Before judgment the defendant set up this privilege by his motion in arrest made March 29, 1904 (p. 278), which was overruled April 6, 1904; and thereupon the Court proceeded to judgment and sentenced the defendant (the Senate being then in session) "to pay a fine to the United States of $2500, and to be immediately confined and imprisoned for and during the term of six months."

Record, pp. 25, 26.

The Court erred not only in *trying* the defendant but in pronouncing and proceeding to enforce immediate sentence of imprisonment, the Senate being in session; and should at least have suspended or deferred the said judgment or its execution until after the adjournment of the Senate. Our contention is that on the foregoing grounds the judgment below ought to be reversed.

THE PROCEEDINGS, JUDGMENT AND SENTENCE OF THE COURT PRESENT SEVERAL IMPORTANT QUESTIONS:

a.

The proceedings, judgment and sentence of the Court below involve "the construction or application of the Constitution of

the United States," within the meaning of the Judiciary Act of March 3, 1891, Section 5 (26 Stats., 826), giving in such cases a writ of error direct to this Court.

No *such* proceedings, judgment and sentence can, under the Constitutional provision (Art. 1, Sec. 6), be rendered against a Senator when the Senate is in session for a violation of Section 1782 Rev. St. (which section does not relate to or include "treason, felony or breach of the peace"), that does not necessarily involve the "construction *or* application" of said Article 1, Section 6, of the Constitution. The exercise by the Court of the power to try the defendant restrained him of his liberty and freedom to attend upon his duties as Senator.

The proceedings, judgment and sentence in this case involved both "the construction *and* application" of the constitutional provision to the case of the defendant. When Senator Burton was sentenced to six months in jail and to immediate confinement and delivered by order of the Court to the Marshal for the purpose of the execution of the sentence, the Court necessarily decided that it had the power to send him at once to jail, although such sentence inevitably deprived the Congress and his constituents and the State of Kansas of representation by him during the session of the Senate. Such a decision is, we maintain, in conflict with the objects and true meaning of the Constitutional provision in question, as we proceed to show.

b.

The trial, judgment and sentence of the Court below in this case are in conflict with the objects and true meaning of Article 1, Section 6 of the Constitution in respect of the immunity of Senator from arrest and

imprisonment during the session of the Senate.

It is among the ancient privileges of Parliament that its members are privileged from arrest when going to, attending upon or returning from Parliament for any less cause than "treason, felony or breach of the peace."

2 Paterson, Liberty of the Subject, pages 140–142, and cases defining "breach of the peace."

1 *Ib.*, 188, 189, 190, 191, 192, 193, as to what are the offenses for which surety of the peace may be required.

Paterson, on the pages above cited, clearly shows that the phrase "breach of the peace" refers to cases of threats of personal injury or violence or of imminent danger to the person or the public peace. It is clear that the words "treason, felony and breach of the peace" as used in the Constitution are not equivalent to *all* criminal offenses, else why did the Constitution not say so instead of specifying, defining and limiting the excepted offenses?

CONGRESS has provided for and regulated the power to "hold to security of the peace in cases arising under the Constitution and laws of the United States" (Rev. Stats. U. S., sec. 727).

"The only exceptions to the privilege of freedom from arrest," says May "which had ever been recognized by Parliament, were 'treason, felony, and breach of the peace,' 'or refusing to give surety of the peace'" (May, Const. Hist. II., Ch. VII. (4th Ed.), p. 3).

THE GROUND OR REASON OF THIS PRIVILEGE IS OBVIOUS. Stubbs states it thus:

"The privilege (of freedom from arrest) in regard to commitments by legal tribunals rests, on the *supreme necessity of attending to the business of Parliament, the King's highest Court*" (3 Stubbs, Const.

Hist., p. 536). "The privilege (of freedom from arrest) was in no case extended to treason, felony, or for security of the peace" (*Ib.*, p. 538).

Mr. Justice STORY states substantially the same reason, viz:

"Because the member has superior duties in another place."

See Com. on Const., Sec. 857, quoted *supra.*

"The privilege is deemed not merely the privilege of the member, or his constituents, but the privilege of the house also. And every man must at his peril take notice who are members of the house returned of record."

Story *ib. sup.*, Sec. 857.

So Judge COOLEY, who says:

"By common parliamentary law, the members of the legislature are privileged from arrest on civil process during the session of that body, and for a reasonable time before and after, to enable them to go to and return from the same. By the constitutions of some of the States this privilege has been enlarged, so as to exempt the persons of legislators from any service of civil process, and in others their estates are exempt from attachment for some prescribed period. For any arrest contrary to the parliamentary law or to these provisions, the house of which the person arrested is a member may give summary relief by ordering his discharge, and if the order is not complied with, by punishing the persons concerned in the arrest as for a contempt of its authority. The remedy of the member, however, is not confined to this mode of relief. **His privilege is not the privilege of the house merely, but of the people, and is conferred to enable him to discharge the trust confided to him by his constituents; and if the house neglect to interfere, the court from which the process issued should set it aside on the facts being presented, and any court or officer having authority to issue writs of habeas corpus may also inquire into the case, and release the party from the unlawful imprisonment."**

Cooley, Const. Lim. (6th Ed.), 160, 161. In the note Cooley says:

"The arrest is only voidable; and in general the party will waive the privilege unless he applies for discharge by motion or on *habeas corpus*. Tarlton v. Fisher, Doug., 671; Fletcher v. Baxter, 2 Aik., 224; Fox v. Wood, 1 Rawle, 143; Sperry v. Willard, 1 Wendell, 32; Wilmarth v. Burt, 7 Met., 257; Aldrich v. Aldrich, 8 Met., 102; Chase v. Fish, 16 Me., 132. But where the privilege is *given on public grounds*, or for the benefit of others, discharge may be obtained on the motion of any party concerned, or made by the court *sua sponte*."

Cooley, Const. Lim. (6 Ed.), p. 161.

So Mr. JEFFERSON. In his Parliamentary Manual, Sec. III., on the subject of *Privilege* he says:

"This privilege from arrest, privileges, of course, against all process the disobedience to which is punishable by an attachment of the person; as a *subpœna ad respondendum* or *testificandum*, or a summons on a jury; and with reason, because a member has superior duties to perform in another place. When a representative is withdrawn from his seat by summons, the 40,000 people [in Kansas many times the number] whom he represents lose their voice in debate and vote, as they do on his voluntary absence: when a senator is withdrawn by summons, his State loses half its voice in debate and vote, as it does on his voluntary absence. The enormous disparity of evil admits no comparison."

The Constitutional provision therefore rests upon the declared organic policy, that during the session of Congress the supreme matter is the public business of Congress, save only in the strictly excepted cases of "treason, felony or breach of the peace."

The foregoing authorities, as well as reason, establish the proposition that the Constitutional exemption is not personal to Senator Burton, but one which the Constitution attaches and attributes to the office of Senator in Congress, and the exemption from arrest

and imprisonment is intended not at all for the personal benefit of the Senator, but wholly for the benefit of the nation, of the Senator's constituents and of the State which he represents.

As the charge in the indictment against the defendant is neither treason, felony nor a breach of the peace, and as the Constitutional provision is based upon the ground that his duties to the State of Kansas and his constituents and the public as Senator are paramount duties during the time the Senate is in session, it follows that his constitutional right or immunity from arrest cannot be waived, for if it could be waived it would result that he might submit himself to the jurisdiction of the Court, whatever the Senate or the State might say or do, and if convicted he would be liable to be sentenced and imprisoned and thereby absolutely precluded from performing his constitutional duties to his State and his constituents and the nation; and this during the time when the Senate was in session, and in the face of the purpose of the constitutional exemption and privilege.

We therefore submit that it was not competent for the Court to try and sentence the defendant to imprisonment for the offense charged at a time when the Senate was in session. This would seem to be the case even if the defendant had not made his motion in arrest of judgment. Because of the indictment of the defendant as a Senator, and the fact of which the Court must take judicial notice that the Senate was in session, the action and judgment of the Court inevitably affected the constitutional right of a Senator and such right was necessarily involved in the case, and was shown on the record; and therefore on this writ of error the question is presented on the record: Whether it was competent under the Constitution for the Court to proceed in this case against the defendant, try and sentence him to imprisonment at a time when the Senate was in session?

It has been held in certain cases that the courts will not *ex officio* notice the privilege of persons who are members, but that such privilege must be brought to their attention by some proper motion or proceeding, as in Prentis vs. Commonwealth, 5 Rand. (Virginia), 697, where Prentis was presented in the Hustings Court for unlawful gaming, served with summons, and not appearing, judgment for $20 finewas entered against him. The defendant was, in fact, a member of the Legislature, and could have insisted on his privilege of exemption of process and arrest. He failed to do so. It was held that the Court was not obliged to notice the fact that the defendant was a member of the General Assembly. Other cases against members, such as slander, ejectment, &c., fall within the same rule.

THE PRINCIPLE DOES NOT APPLY TO THE CASE AT BAR, which is *sui generis* and peculiar. The indictment alleges that the defendant is and was a member of the Senate of the United States; and this is a criminal prosecution against him because he was such a member. The indictment alleges that his term as Senator would not expire till March 4, 1907. The indictment charged a "misdemeanor" and not treason, felony or breach of the peace, and, therefore, the charge alleged in the indictment brings the defendant on the face of the record within the immunity from arrest ordained in the Constitution. The Court was obliged to take judicial notice of the fact that the Senate was in session, and, therefore, all the facts appeared of record necessary to constitute the constitutional immunity from arrest during the session of the Senate. No fact *dehors* the record was necessary to bring the defendant's case within the constitutional privilege or exemption from arrest. The record gave the Court full notice of the defendant's constitutional immunity. In this aspect the case falls within the rule stated by Cooley, that the Court will in proper cases give the benefit of the exemption *sua sponte*. The plain duty of the Court,

we submit, was, under these circumstances, to keep its hands off the defendant while the Senate was in session.

THE RECORD shows the following facts as to the appearance of the defendant and the action of the Court:

On January 27th the defendant appeared in person in court and on motion of the District Attorney the Court *ordered* the defendant to be arraigned; and on application of the defendant the Court *ordered* that he be allowed to give bail for his appearance in the sum of ten thousand dollars on the 7th day of March and from time to time thereafter. On the 9th of February the Court *ordered*, the defendant not being stated to be present, that the cause be set for trial on March 22, 1904. On March 22d the defendant appeared in pursuance of his recognizance and went to trial. The defendant made no express waiver of any right. What the defendant in a criminal prosecution may or may not waive expressly or impliedly is so fully considered by this Court in the cases below referred to that we deem it unnecessary to do more than cite them.

Hopt vs. Utah, 110 U. S., 574, 579.
Thompson vs. Utah, 170 U. S., 343, 353.
Opinion of Mr. Justice HARLAN dissenting, in
Schick vs. United States, October Term, 1903.

Inasmuch as the exemption from arrest is not given to the defendant for his own benefit or advantage, but rests upon public grounds, it is against all principle to hold that in such a case as this he could waive the exemption, even if he had undertaken or attempted to do so.

We maintain, for the reasons above stated, that the Court erred in assuming to *try* the defendant when the Senate was in session, and that the defendant did not waive and could not waive the constitutional exemption and privilege, or if he could to any extent

waive such exemption and privilege such waiver did not and could not in any event extend beyond the time when he made his motion in arrest of judgment, asserting and claiming the benefit of such exemption and privilege. At the very least the Court should have deferred or suspended the judgment and sentence of imprisonment or its execution until the close of the then pending session of the Senate. Such is the view held by Parliament and the English Courts as shown by Stubbs and Jennings in the footnote.[1]

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[1] Stubbs Const. History of England, Vol. III., pp. 536 *et seq.* (Oxford Ed., 1880), from which the following extracts are taken :

" The recognition of the right, however ancient and full the admission may have been, was a very different thing from the power of enforcing it ; and the House of Commons seems to have had no means of doing this but by petition, or by obtaining a writ of *supersedeas*. Besides the case of Thorpe, already mentioned. the most prominent cases are those of William Lark in 1429,[1] and Walter Clerk, burgess of Chippenham, in 1460.[2] Lark was the servant of William Milrede, member for London, and had been arrested at the suit of Margery Janyns, committed to the Fleet prison by the Court of King's Bench, and there detained for damages. The Commons petitioned that in consideration of the privilege of members securing them against arrest, except for treason, felony, or breach of peace, Lark might be liberated during the session of parliament; and that the custom claimed for the Commons might be established by statute. The King rejected the last petition, *but ordered the release of Lark, securing to Margery her rights after the close of the session.*[3] In the case of Clerk, who had been arrested for a fine to the King and damages to two private suitors, and afterwards imprisoned and outlawed the Commons petitioned that the Chancellor might order his release by a writ to the Warden of the Fleet, saving the rights of the parties after the dissolution. This the King granted.[4] These, however, are only two out of a large number of like precedents. Another famous case occurred in 1477 ; that of John Atwyll, member for Exeter, against whom several writs of arrest had been obtained at the instance of a private litigant. The Commons petitioned that writs of *supersedeas* should be issued in

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[1] Rot. Parl. IV., 357.
[2] *Ibid.* V., 374.
[3] Hatsell, Precedents, I. 17–22.
[4] Hatsell, Precedents, I. 34–36.

THE CONCLUSION RESULTS that the only way to give effect to the paramount objects of the Constitution, and at the same time prevent the grave and serious conflicts between the judicial tribunals and the legislative department which have become memorable in

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each case, *saving the rights of the suitor after the close of the session.* In this case it is observed that, although the Commons claim a right to the suspension of the writ of execution, they do not insist on redress for the impleading of a member during the session as a breach of privilege.[1] The condition of affairs at the end of the reign of Edward IV. is thus stated: 'When a member or his servant has been imprisoned, the house of commons have never proceeded to deliver such person out of custody by virtue of their own authority; but, if the member has been in execution, have applied for an act of parliament to enable the chancellor to issue his writ for his release, or, if the party was confined only on mesne process, he has been delivered by his writ of privilege to which he was entitled at common law.[2]'

The privilege was in no case extended to imprisonment for treason, felony, or for security of the peace.

See, also, Jennings Anecdotal History of British Parliament, pages 404, 405, from which the following extracts are taken.

"DURATION OF THE IMMUNITY FROM ARREST.—A remarkable case concerning the freedom from arrest, was decided by Vice-Chancellor SIR CHARLES HALL in April, 1880. On March 24, the day on which Parliament was dissolved, a motion was made before the Vice-Chancellor to commit Mr. Fortescue Harrison, at that moment M. P. for Kilmarnock, for contempt of court in not complying with an order of the Chancery Division in regard to certain transactions in which he was concerned. Mr. Harrison's counsel raised the preliminary objection that as a Member of Parliament his client was privileged from arrest, and this objection was sustained by the Vice-Chancellor. Parliament was dissolved within a few hours of this decision, and the question then arose whether its privilege still protected Mr. Harrison. On the 15th of April this question was argued, and the Vice-Chancellor held that the period claimed by Parliament had been legally defined by the Court of Exchequer as a period of forty days before and after the meeting of Parliament. His Honor said it was clear time must be given for an ex-member to return home before his privilege expired.

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[1] Hatsell Precedents, i. 53.

[2] Stubbs Const. History of England, III., pp. 586 *et seq.*

the cases of Wilkes, Stockdale [1] and others, in England, is for this Court to hold that the judicial tribunals have no right to arrest or to detain for trial or to imprison a member of Congress (except in the specified

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Was this time indefinite and uncertain, or definite? An indefinite period would be very inconvenient, and that being so, having regard to the fact that the only case which mentioned any particular time, Duncombe's case, gave forty days as the term during which the privilege extended, he must hold that Mr. Harrison was still entitled to privilege, twenty-three only having expired since the dissolution. *The motion must, therefore, be refused, but that would not prevent the liquidator from again moving against Mr. Harrison when the full term had expired.*

COMMITTAL OF MEMBERS BY THE LAW COURTS.—Mr. Walley, member for Peterborough, having in 1874 been committed by the Lord Chief-Justice of the Queen's Bench (SIR A. COCKBURN) for contempt of Court and fined £250, a letter from the Chief-Justice to the Speaker, notifying the circumstances, was read to the House on the first meeting of the Parliament in that year, and, the explanation being accepted as satisfactory, the House declined to interfere. In a similar case in 1837, Mr. Lechmere Charlton having been committed, the House, "as sole and exclusive judge of its own privileges," claimed to be informed of the nature of the offense, and having received the information, a committe of privileges reported that Mr. Charlton's claim to be discharged ought not to be admitted. In another case, in 1831, Lord Chancellor BROUGHAM laid it down that a committal by order of the Court was "no violation of the privileges of Parliament if the members of Parliament have violated the rights and privileges of this Court, which is of as high a dominion and as undisputed a jurisdiction as the High Court of Parliament itself."

[1] See Yonge, Const. Hist., 370, 372.

See Autobiography of Lord CAMPBELL (Vol. II., p. 129), who says:

"The consequences (of the conflict between the House and Courts) would have been that, the sergeant-at-arms, even with the mace in his hand, would have been sent to Newgate by the Court of Queen's Bench. The House must have retaliated by committing the judges."

See, also, Lord CAMPBELL'S Great Speech on Parliamentary Privilege in Stockdale vs. Hansard, and his reference to the Supreme Court of the United States. Lord CAMPBELL'S Speeches, pp. 179, 180: Also, Life of Lord CAMPBELL (by Hardcastle) II., pp. 188–193; 3 May, Const. Hist., Chap. XI.

cases of "treason, felony or breach of the peace") while Congress is in session; or at the least to hold that if they have power to *try*, they have no power to *imprison* until the close of the session.

VI.

Erroneous Rulings of the Court on the Admission of Evidence.

Under this Point VI. we make this distinct proposition, namely, that even if there was any evidence to go to the jury, which we deny (see Point II., *supra*, page 52), yet in the course of the trial the Court made numerous erroneous rulings on the admission of evidence, prejudicial to the defendant, which require that the judgment be reversed.

The error of the trial Court in holding that if the defendant performed *any services whatsoever* before the Post-office Department for the Rialto Grain and Securities Company and received compensation therefor, he was guilty of an offense under Section 1782 of the Revised Statutes, runs all through the rulings of the Court on the admission of evidence and in its charge and instructions to the jury and in the additional charge. Under this erroneous view the trial Court repeatedly made erroneous rulings on the admission of evidence and permitted the prosecution to introduce a great mass of evidence—letters, telegrams, booklets, circulars, etc.—which did not prove or tend to prove the charge laid in the indictment, nor any other offense whatsoever by the defendant.

Under this heading we refer to the various rulings of the Court on the admission of evidence over the objection and exception of the defendant. The objections to such evidence are—

(1) that it is immaterial and irrelevant, and could only tend to confuse the issues in the case and prejudice the jury;

(2) that this evidence was not only received but was received on the theory, repeatedly stated by the Court, that if *any* service was rendered by the defendant for the Rialto Grain and Securities Company before the Post-office Department, such evidence would prove or tend to prove the defendant guilty, and the Court wholly failed to limit the evidence to be introduced to evidence which would prove or tend to prove that the defendant rendered services to prevent the issuance of a fraud order. See the statement and rulings of the Court on this point, quoted and referred to, this brief, pages

(3) Not only did the Court receive such evidence and permit it to be stated and read to the jury, but the Court wholly failed afterwards to withdraw any of this erroneously admitted evidence from the consideration of the jury, and, on the contrary, told the jury that they should consider *all* of the evidence which had been introduced.

The indictment charges that the defendant for compensation rendered services to the Rialto Grain and Securities Company before the Post-office Department in order to prevent the issuance of a fraud order. This is "the nature and cause of the accusation" against the defendant within the meaning of the Sixth Amendment to the Constitution, and this was the matter and offense and the only matter and offense which, either under the Sixth Amendment or under the general principles of law, could be tried by the Court in this case. Notwithstanding this limitation of the inquiry, the Court permitted the prosecution to introduce all sorts of evidence which did not prove or tend to prove the charge in the indictment.

A reading of the record in the present case shows a very curious and unusual course of proceedings in the introduction of evidence on behalf of the prosecution. If the defendant, as alleged in the indictment, performed services before the Post-office Department

to prevent the issuance of a fraud order, it would seem to be not a difficult thing at the beginning of the case to call the officers of the Post-office Department and have them testify directly as to what those services were, and then, if there were any letters, telegrams, or other documentary evidence, to introduce those in the appropriate place in connection with the services proved. This, however, was not the course pursued by the prosecution, but the prosecution introduced a great mass of evidence—letters, telegrams, booklets, &c., &c.—which did not prove or tend to prove the charge laid in the indictment, to wit, that the defendant for compensation rendered services to the Rialto Grain and Securities Company before the Post-office Department to prevent the issuance of a fraud order; and the prosecution wholly failed to prove that the defendant rendered any such services.

This is not an objection to the mere order of proof. The Court, of course, has a certain discretion as to the order in which it will permit proof to be made. With the exercise of that discretion we are not now finding fault, although objection was made on the trial because the order of proof tended to confuse the issues in the minds of the jury. What we are now complaining of is that the Court, after it had admitted this great mass of irrelevant evidence offered by the prosecution, over the objection and exception of the defendant, permitted all this irrelevant evidence to go to the jury, although the prosecution did not connect this evidence with the defendant so as to have it prove or tend to prove the charge in the indictment.

The *defendant* was on trial under the indictment, not for any acts which the Rialto Grain and Securities Company had done, but only for the defendant's own acts, and, so far as his own acts were concerned, only on the specific charge laid in the indictment. It was, therefore, wholly immaterial whether or not the Rialto Grain and Securities Company had been or had not been engaged in any wrong-doing, though, so far as the record in the present case indicates, that company was

not guilty of any wrong-doing. But the defendant was on trial and not the Rialto Grain and Securities Company.

On pages 167 and 168 of the record, notwithstanding our express willingness and desire to go into a full inquiry upon this subject to show that the Rialto Grain and Securities Company was doing an honest business, the Court again reiterates and clinches upon the other side his conclusion that no testimony of that sort was admissible, and that whether or not the Rialto Grain and Securities Company was carrying on an honest or a fraudulent business was immaterial (p. 168).

We submit, therefore, that the Court if it meant to exclude an inquiry into the business of the Rialto Company should have excluded on the defendant's objection any immaterial and irrelevant testimony being brought into the case discrediting such company and accusing it of fraudulent purposes. Senator Burton had accepted employment from this company, and the United States Attorney had industriously charged in the indictment that the Rialto Grain and Securities Company had devised a scheme to defraud. It appears ample room and verge enough was given by the Court to the government attorney to prove so far as convincing the mind of the jury was concerned, the fraudulent nature of the business of the Rialto Company by the introduction of these letters and the accompanying booklets.

Given these facts and the use that was made of them by the Government in its arguments to the jury, the additional simple fact of Senator Burton being employed at all and receiving compensation was enough to insure his conviction at the hands of a St. Louis jury at the time and under the peculiar environment of this trial; considering, of course, the ruling of the Court as to what constituted the elements of the offense and its further or additional charge to the jury, elsewhere referred to in this brief.

We proceed to consider the erroneous rulings of the Court on the admission of evidence.

THE HOUT AND EVANS LETTERS.

The prosecution offered and read in evidence, over the objection and exception of the defendant (Record, page 33), the letter of Bella Evans and the letter of Mrs. Hout (Record, page 34). The letters were objected to as follows (page 33):

"JUDGE KRUM: I object to the letters, first, because they are not competent, even as filed in the Post-Office Department, as creating a matter or thing in which the United States was interested directly or indirectly; secondly, that the matters are immaterial, because the only fact open to consideration upon the theory of the Government is the filing of them in the Department. What the letters themselves were or are is not material to any issue in this case."

The Court said (page 33):

"Of course it will be understood now that the truth of the statements in the letters may be entirely immaterial. The only question is whether the letters present something that would be matter of investigation, and therefore it may become necessary and proper to read the letters. But the truthfulness of the letters, as to whether they state the truth or not, is immaterial. The only material thing is whether they present the subject for investigation."

The prosecution thereupon read the letters to the jury (Record, page 34).

Consider for a moment what an impression these letters must have made when they were read to the jury. Obviously these letters would prejudice the jury against the Rialto Grain and Securities Company. That company was not on trial, but the defendant; and from one end of this trial to the other it was not shown by the prosecution that the defendant ever saw those letters. On the contrary it was shown that the

defendant never saw them (Record, pp. 146, 147). The reading of these letters could not have failed to prejudice the jury, not only against the Rialto Grain and Securities Company, but also against the defendant.

Furthermore, it developed later on by the testimony of the prosecution's own witness, Dice (Record, page 70), that

"his [Inspector Price's] report at that time [November 14, 1902, before the defendant was ever employed by the Rialto Grain and Securities Company] was to the effect that the two complaints [the complaints in the Hout and Evans letters] were not of such a character as to warrant action in the matter of the recommendation of a fraud order, or something of that kind".

The Court not only permitted these Hout and Evans letters to be read in evidence as against the defendant and over the objection and exception of the defendant, but when it was shown by the further evidence introduced in the cause that the matter of these complaints of Hout and Evans was ended by the Inspector's report, before Senator Burton was ever employed by the Rialto Grain and Securities Company, the Court did not remedy this error by withdrawing these letters or excluding them from the consideration of the jury, but on the contrary, instructed the jury to consider *all* the evidence which had been introduced.

THE ALLEN LETTER, THE LETTER OF THE RIALTO GRAIN AND SECURITIES COMPANY TO ALLEN, AND THE BOOKLET, "GOLDEN GAIN FROM GOLDEN GRAIN."

Over the objection and exception of the defendant (Record, pages 35, 36), the trial Court permitted the prosecution to introduce and read in evidence against the defendant the letter of Arthur M. Allen to the Postmaster-General (Record, page 36), the letter of the Rialto Grain and Securities Company to A. M. Allen (Record, page 37, 38), and also to put in evidence the booklet "Golden Gain from Golden Grain" (Record,

pages 38–50), the Court saying (Record, page 50), "*You may consider the book offered and refer to it if you wish.*"

The evidence in the case shows that the defendant never knew of this letter of Allen and this letter of the Rialto Grain and Securities Company, and the booklet accompanying the same, until after his indictment in the present case.

Cochran, Chief Inspector of the Post-Office Department, with whom alone Burton had any conversations, testified (Record, page 148) as follows:

"Q. What I want to get at is the fact whether or not these complaints, other than those of the two Albany women, were called to the attention of the Senator? A. My best judgment would be that they were not. I have no recollection of that.

Q. And that would cover the complaint of *Arthur M. Allen* of January 5, 1903, and S. A. Warner, that is, the Pittsfield lady, of January 21, 1903; those are are all that have been introduced here. That would cover all of those? A. Yes, sir."

Cochran also testified (Record, page 147):

"Q. It is a fact, isn't it, as you recall this occasion when Senator was advised of these two complaints, was the only one upon which he was advised of any complaints having been lodged against the company? A. That is my recollection of the matter."

The defendant Burton testified as follows (Record, page 220):

"I never heard that there was any complaint against the Rialto Grain & Securities Company until after I was indicted, except these two first that were mentioned to me on my first visit," *i. e.*, those of Hout and Evans.

The prosecution, therefore, utterly failed to connect Senator Burton in any way with this Allen letter and the Rialto Grain and Securities Company letter and the booklet "Golden Gain from Golden Grain;" and yet the Court permitted the introduction and reading of

these letters and a reference to this booklet, all of which could not but have prejudiced the jury against the defendant.

Furthermore, neither the Allen letter nor the Rialto Grain and Securities Company letter, nor this booklet, in any way prove or tend to prove the charge in the indictment, namely, that Senator Burton, for compensation, performed services before the Post-Office Department to prevent the issuance of a fraud order.

Moreover, the Court never corrected or attempted to correct this error by withdrawing from the consideration of the jury this Allen letter, the Rialto Grain and Securities Company letter and the booklet "Golden Gain from Golden Grain," but, on the contrary, instructed the jury to consider *all* of the evidence which had been produced.

Warner Letter and Booklet "Giant Oaks From Tiny Acorns Grow."

Over the objection and exception of the defendant (Record, pp. 50, 51) the trial Court permitted the prosecution to introduce in evidence letter of Sarah A. Warner to the Postmaster-General (Record, p. 52), and the booklet entitled "Giant Oaks From Tiny Acorns Grow." The letter was read to the jury.

The Court committed the same error in admitting this Warner letter and booklet that it committed in the case of the Allen letter and the Rialto Grain and Securities Company letter and booklet "Golden Gain From Golden Grain," above mentioned. The testimony of the Chief Post-office Inspector, Cochran, above quoted (Brief, pp. 52, 55), as well as the testimony of Burton, above quoted, shows that Burton had absolutely no knowledge whatever of this Warner letter or booklet.

Neither this letter nor the booklet thus admitted in evidence prove or tend to prove the charge laid in the indictment, namely, that the defendant, for compensation, rendered services for the Rialto Grain and

Securities Company, before the Post-office Department, to prevent the issuance of a fraud order.

By reference to the letter it will be seen that it contains a most virulent attack on the Rialto Company by one who had no complaint to make against the Rialto Company whatever of any personal wrong done to her. This also is a matter the existence of which is not shown to have ever been brought to the attention of Senator Burton, but on the contrary it is shown affirmatively that he had no knowledge of the existence of the fact that any such letter had ever been written to or received by the department. The Court, as we have shown, allowed the introduction of these letters and booklets and authorized counsel to refer to them if they wished.

On page 51 of the record the following appears:

"JUDGE KRUM: I submit, if your Honor please, that the reading of these letters, will simply operate to drag into this case that which does not belong there at all.

THE COURT: It is not a question of good faith. The only question is whether it was pending before the Department in the form of inquiry, and perhaps I might say in answer to your objection that in the light of your argument before the jury it is proper for you to contend that this is a trifling matter, that only two complaints were before the department, or something to that effect.

JUDGE KRUM: Only two that were brought to the attention of the defendant at all.

THE COURT: Just enough to show that something was submitted to the Department, enough to put them upon inquiry.

MR. LEHMANN: We object because it is tending to create an issue which should not be made. The fact that the letter was received is the only thing that is competent.

THE COURT: If it was sent to the Department, it becomes necessary to show what it was. It might be inoffensive matter, something not involving or suggesting an inquiry. But it is the basis of a proceeding, again stating that it is not an issue in this case as to whether the Rialto Grain and Securities Company was in good faith carrying on business. The only question is whether a question was pending before the Depart-

ment. It is not necessary to read them any more than to call attention to them.

JUDGE KRUM: We make the same objection as before." Defendant excepted (p. 51).

Moreover, the Court never corrected or attempted to correct this error by withdrawing from the consideration of the jury this Warner letter, and the booklet, "Giant Oaks from Tiny Acorns Grow," but on the contrary instructed the jury to consider *all* of the evidence which had been produced.

FRAVEL LETTER AND LETTER OF RIALTO GRAIN AND SECURITIES COMPANY TO FRAVEL.

Over the objection and exception of the defendant (Record, p. 53) the Court permitted the prosecution to introduce and read in evidence the letter of Fravel to the Postmaster-General (Record, p. 54), and the letter of the Rialto Grain and Securities Company to Fravel (Record, p. 55). The Court committed the same error in admitting these letters in evidence and permitting them to be read as was committed in the case of the Warner letter, Allen letter, and Rialto Grain and Securities Company letters and booklets above mentioned.

The evidence shows that the defendant never even knew of the existence of any of these (see Cochran's and Burton's testimony, this Brief, p. 84). These letters or booklets do not prove or have any tendency to prove the charge named in the indictment, namely, that the defendant for compensation rendered services for the Rialto Grain and Securities Company before the Post Office Department to prevent the issuance of a fraud order.

Moreover, the Court never corrected or attempted to correct this error by withdrawing from the consideration of the jury this Fravel letter and the Rialto Grain and Securities Company letter, but, on the contrary, instructed the jury to consider *all* of the evidence which had been produced.

So-called "Jacket" Entries.

Over the objection and exception of the defendant (Record, p. 63) the Court permitted the prosecution to introduce and read in evidence the entries on the so-called "jacket" kept in the Post-office Department. The evidence failed to connect the defendant in any way with these entries, except in this, that on the first visit of the defendant to the Post-office Department, November 20, 1902, he was informed by Cochran of the existence of the Evans and Hout letters. But defendant did not even *know* that there was a "jacket" or what a "jacket" was until after his indictment (Record, p. 220). The defenndant stated this information in his letter of November 20 to Harlan (Record, p. 94) and Harlan in his letter of November 22 in reply (Record, p. 175) stated the fact (afterwards proved as the fact by the Government's own witness on the trial, Dice, p. 70, and Price, pp. 202–3), namely, that the Hout and Evans letters

"have been investigated by a Post Office Inspector connected with this Department, and he found the actions of our Company to be all right, and, we are informed, made a report in favor of our Company relative to the same."

The other matters and letters mentioned in this jacket the defendant knew nothing about until after his indictment.

This jacket did not prove or tend to prove the charge laid in the indictment, namely, that the defendant for compensation performed services for the Rialto Grain and Securities Company before the Post-office Department to prevent the issuance of a fraud order.

Moreover the Court never corrected or attempted to correct this error by withdrawing from the consideration of the jury this "jacket" evidence, but on the contrary instructed the jury to consider *all* of the evidence which had been produced.

Burton Letter of November 20, 1902.

Over the objection and exception of the defendant (Record, pp. 93, 94), the Court permitted the prosecution to introduce and read in evidence the letter of the defendant to Harlan dated November 20, 1902 (Record, p. 94). This letter states the fact that the defendant had called at the Post Office Department, and had been informed of the existence of the complaints of Evans and Hout, and that those complaints had been sent out from the Post Office Department on the 7th of November, and that doubtless the inspector would call the attention of the Rialto Grain and Securities Company to them if he had not already done so. The defendant then states "I should like to be advised what there is in these complaints," etc. What took place on this visit of Senator Burton to the department on November 20, 1902, is fully stated under Point II., subdivision A of this brief, p. 54). The evidence there set forth at length, both of Post Office Inspector Cochran and the defendant, shows conclusively that the defendant did not on November 20 perform any services for the Rialto Grain and Securities Company before the Post Office Department in order to prevent the issuance of a fraud order.

The letter of November 20th does not prove or tend to prove the allegation of the indictment that the defendant for compensation performed services before the Post Office Department to prevent the issuance of a fraud order.

Moreover, the Court never corrected or attempted to correct this error by withdrawing from the consideration of the jury this November 20 letter, but on the contrary, instructed the jury to consider *all* of the evidence which had been produced.

See also *ante*, p. 98, as to this letter of Nov. 20.

The McGowan Matter and Telegrams.

Over the objection and exception of the defendant (Record, pp. 123, 124, 125) the Court permitted the prosecution to introduce in evidence the telegram dated February 11, 1903, from Burton to Harlan (Record, p. 125) in regard to one McGowan, who made a claim against the Rialto Grain and Securities Company. The Court, admitting this telegram, said (Record, p. 124, bottom) :

" I cannot tell what the dispatch will show, but I assume some connection will be shown.
" Judge Krum : There is not a particle of connection.
" Col. Dyer : We will show the connection.
" Court : Of course, I cannot tell now."

There was an utter failure of the prosecution to show any connection whatever. The telegram was read in evidence (Record, p. 125), and, so far as it shows anything, it is that Senator Burton made inquiry in the Indian Department as to who McGowan was, and that was all.

Likewise over the objection and exception of the defendant (Record, p. 126), the Court permitted the prosecution to introduce the telegram of February 11, 1903, of Mahaney to Burton.

Neither of these telegrams proved or tended to prove the charge alleged in the indictment, namely, that the defendant for compensation rendered services to the Rialto Grain and Securities Company before the Post Office Department in order to prevent the issuance of a fraud order.

The Court plainly intended in the admission of this testimony to impress upon the jury his conviction that any visits to any of the Departments in Washington, whether such visits were with the purpose to prevent the issue of a fraud order in a particular matter, as set forth in the indictment, or not, were prohibited services within the terms of the indictment and were to be con-

sidered by the jury as tending to proof of defendant's guilt.

Moreover the Court never corrected or attempted to correct this error by withdrawing from the consideration of the jury these telegrams, but on the contrary instructed the jury to consider *all* of the evidence which had been produced.

See also Point II. *ante*, p. 111, as to this letter and telegram.

TELEGRAMS OF MAHANEY TO BURTON, FEBRUARY 25, AND BURTON TO MAHANEY, FEBRUARY 27.

Over the objection and exception of the defendant (Record, pp. 127, 128), the Court permitted the prosecution to introduce in evidence telegrams of Mahaney to Burton, dated February 25, and of Burton to Mahaney, dated February 27 (Record, p. 128). As against the objection of the defendant the Court said (page 127):

"Inasmuch as the indictment does not indicate any details, but the general statement, any of this testimony which tends to show *services* were rendered before the Department is competent."

Note this statement of the Court, "any of this testimony which shows services were rendered before the Department is competent;" not any of this testimony which shows *services to prevent the issuance of a fraud order*, the offense and the only offense alleged in the indictment, but the Court under this ruling and under other similar rulings let in testimony of any and all things that the defendant did before the department, without any regard whatever to whether the evidence tended to show that the defendant performed services to prevent the issuance of a fraud order or not.

Neither the telegram of Mahaney nor the reply of Burton proved or tended to prove the charge laid in the indictment, namely, that the defendant for compensation performed services for the Rialto Grain and

Securities Company before the Post-office Department in order to prevent the issuance of a fraud order.

The telegram of Burton of February 27th, so far from proving the performance of any services, states that "there is no complaint in the Department against you," and, therefore, there was nothing in respect of which to perform services.

Moreover the Court never corrected or attempted to correct this error by withdrawing from the consideration of the jury these telegrams, but on the contrary, instructed the jury to consider *all* of the evidence which had been produced.

See also Point II. *ante*, p. 112, as to these telegrams.

TELEGRAM OF MAHANEY TO BURTON, FEBRUARY 14, 1903.

Over the objection and exception of the defendant (Record, p. 129) the Court permitted the prosecution to introduce and read in evidence the telegram of Mahaney to Burton, dated February 14, 1903. This telegram shows on its face that it had to do only with the State Investigating Committee, and had absolutely nothing to do with the United States or the Post Office Department.

This telegram did not prove or tend to prove in any way the charge made in the indictment—namely, that the defendant for compensation rendered services for the Rialto Grain and Securities Company before the Post Office Department to prevent the issuance of a fraud order.

Moreover, the Court never corrected or attempted to correct this error by withdrawing from the consideration of the jury this telegram, but on the contrary instructed to jury to consider *all* of the evidence which had been produced.

Letter of Harlan Dated December 2, 1902; Letter of Burton Dated December 9, 1902, and Letter of Harlan to Burton Dated December, 3, 1902.

Over the objection and exception of the defendant (Record, p. 134) the Court permitted the prosecution to introduce and read in evidence letter of Harlan to Burton dated December 2, 1902, and letter of Burton to Harlan dated December 9, 1902 (Record, pp. 135–137). The letter of Harlan dated December 2, 1902, relates to the indictment of Dennis and the preparation of that case. The letter of Harlan to Burton dated December 3, 1902, relates to Bowman and Shove. The letter of Burton to Harlan dated December 9, 1903, is in answer to the said letter of Harlan of December 3 in regard to Bowman and Shove, and in regard to the Dennis case (see as to these three letters this brief, pp. 101–104).

None of these three letters proves or tends to prove the charge laid in the indictment, namely, that the defendant for compensation rendered services for the Rialto Grain and Securities Company before the Post Office Department to prevent the issuance of a fraud order.

Moreover, the Court never corrected or attempted to correct this error by withdrawing from the consideration of the jury these three letters, but, on the contrary, instructed the jury to consider all of the evidence which had been produced.

See *ante*, p. 101 *et seq.*, as to these letters.

Burton's Letter of February 11, 1903.

Over the objection and exception of the defendant (Record, p. 138), the Court permitted the prosecution to introduce and read in evidence letter of Burton to Harlan, dated February 11, 1903 (Record, p. 139).

This letter did not prove or tend to prove the charge laid in the indictment—namely, that the defendant,

for compensation, performed services for the Rialto Grain and Securities Company before the Post-office Department to prevent the issuance of a fraud order, but the letter related entirely to another matter.

Counsel for the prosecution attempted to seize hold of general expressions in letters passing to and from Burton, to prove the allegations of the indictment. The danger of perverting any general expression in a letter is well illustrated in the case of this letter of Burton, dated February 11th. He says, addressing Harlan: "I have your telegram telling me that things were satisfactory between you and Dice. I hope you are not letting him mislead you in any way." How easy for the prosecution to jump at the conclusion that this refers to the question of the issuance of a fraud order! But it does not refer to any such thing. So also this: "Be sure and keep me advised if there is anything to do at this end of the line before going away. I have tried to keep the Department in a good humor with Major Dennis, and think I have succeeded." How easy to jump at the conclusion that this also refers to the question of the issuance of a fraud order! The fact is clearly otherwise. The defendant had had two conferences with Mr. Cochran, January 24 and February 5 (see this Brief, p. 106), in order to have the department direct Mr. Dice to turn over to the Rialto Grain and Securities Company the books of the Brooks Brokerage Company. At the interview on February 5th, according to Mr. Cochran's testimony (p. 143):

"The senator either showed or read me a telegram from Mr. Harlan, stating that they had not got possession of this book or books, and that Col. Dyer stated he had no further use for them, and the Senator again said that if that was the case, they ought to be returned, that *Mr. Dice was acting in bad faith* in insisting upon keeping the books. I promised to send a telegram of inquiry the next morning, and I did send one."

Judge KRUM stated when this telegram of February 11 was offered (page 138):

"It relates to an effort to have Mr. Dice, who had in his possession the books of the Brooks Brokerage Company, turn them over to Mr. Dennis after the trial of the Dennis case."

Bearing these things in mind, let us read the letter of February 11, and it is clear that it refers only to the books of the Brooks Brokerage Company. The Court, however, permitted this letter to be read in evidence to the jury without showing any connection between this letter and any question of the issuance of a fraud order, and the Court said, page 138:

"I will say again, so there may be no misunderstanding as to the view the court has in admitting this testimony, that the letters, telegrams—this letter among others—are admitted to go to the jury, to show the relations existing between the defendant in this case and the Rialto Grain and Securities Company, with the view of aiding the jury in the determination of the situation which was stated by counsel in their opening, as to what his true relation was. *Whether* his relation was aiding, assisting and rendering services *before the department* or whether his relation *was entirely exclusive of that;* and for the purpose of acting as general counsel upon the situation. That is the sole ground upon which this letter, and other letters, have been admitted. As to this letter, inasmuch as it bears upon his relations to the Company, and his services rendered, that objection is overruled."

"To which ruling by the court the defendant, by his counsel, then and there duly excepted."

Note the language of the Court, which is the keynote of the Court's rulings on all this evidence, and subsequently in his charge and additional charge, namely,

"whether his [defendant's] relation was aiding, assisting and rendering services *before the Department*, or whether the relation was *entirely* exclusive of that, and for the purpose of acting as General Counsel upon the situation."

In other words, in the view of the Court, there were only two kinds of services—one "*before the depart-*

ment," which was prohibited by Section 1782 of the Statute, and the other "*entirely exclusive of that,*" which was not prohibited. The Court did not discriminate between the services rendered for the purpose of preventing the issuance of a fraud order and services rendered for any other purpose, but permitted evidence to be introduced of *all* services of *all kinds* whatsoever before the department.

Moreover, the Court never corrected or attempted to correct this error by withdrawing from the consideration of the jury this letter of February 11th ; but, on the contrary, instructed the jury to consider *all* of the evidence which had been produced.

See Point II. *ante*, p. 111, as to this letter.

The Trial Court Did Not by its Charge and Instructions to the Jury Cure the Error which it Made in the Admission of Improper Evidence ; But, on the Contrary, Confirmed Such Error.

While the Court might permit improper evidence to be introduced for the time being in the expectation that the prosecution would introduce further evidence to make the improper evidence material and proper, and while the Court might, if such further evidence was not forthcoming, by its instructions, charge the jury to disregard and to consider as out of the case any such improper evidence, yet that is not what the trial Court did in the present case. After the trial Court had permitted all this improper evidence to be introduced and to go before the jury, the trial Court in its charge and instructions to the jury did not withdraw any of this evidence from their consideration ; but, on the contrary, said (Record, page 239) :

" In determining each and all the other issues of this case, you should also consider *all* the evidence, facts and circumstances in evidence, as well as all fair and reasonable inferences which may be drawn therefrom."

In other words, the Court not only permitted but instructed the jury to consider "*all* the evidence, facts and circumstances in evidence." Nowhere in the charge does the Court exclude from their consideration any improper evidence which was admitted.

VII.

ERRORS IN ADDITIONAL CHARGE AND ORIGINAL CHARGE.

The trial Court erred in its additional charge to the jury after they had come back for further instructions (Rec., pp. 246–252), **as well as in its original charge and instructions.**

The errors of the Court under this heading are of two kinds: *First*, in its instructions on propositions of law, and also in depriving the defendant of his constitutional right to have the question of his *guilt of the charge laid in the indictment* tried and decided by the jury; and *Second*, in coercing the jury into rendering a verdict of guilty.

FIRST. ERRORS IN INSTRUCTIONS ON PROPOSITIONS OF LAW.

Preliminary to the discussion of the questions of law arising under the ADDITIONAL CHARGE of the Court (Rec., pp. 246–252), it is important to fix in the mind the exact charge in the indictment.

It goes without saying that an indictment in general terms that the defendant for compensation rendered services before the Post-office Department in a matter in which the United States was interested, without specification would not be sufficient. So an averment that the defendant for compensation endeavored to

prevent the issue of a "fraud order" without an averment that the question whether such an order should be issued was "before the department" or "pending therein" for decision, would not be sufficient. The indictment in this case recognizes the necessity for such specifications.

Accordingly, the GRAVAMEN OF THE OFFENSE laid in the indictment is that the Post Office Department had before it pending for decision the question whether a fraud-order should be issued against the Rialto Company and that with knowledge of such pending inquiry, Senator Burton for compensation rendered services in the matter or case thus pending with the view and for the purpose of inducing the officials of the Department to decide such pending matter or case against the issue of such fraud order.

This, to wit, the preventing of the issue of a fraud order against the Rialto Grain and Securities Company for compensation, is the precise and only matter charged in the indictment and in each count thereof. Even if it were competent for the United States to have made the charge in the indictment more general as to what was sought to be done (a question that need not be considered here), nevertheless, when the Government specified the particular matters which constituted the alleged offense, the Government is necessarily confined to the proof of those particular matters. Thus the government cannot mislead the defendant by alleging that his defense consisted of services to prevent the issue of a fraud order, and then attempt to prove this charge by showing that he rendered services in the Department in other matters. The Government could not do this even if such other services attempted to be proved were within the prohibition of the statute, but in the present case, as already shown, under POINT II., *supra*, the other services proved were entirely innocent.

Only "services" which were intended by the defendant to prevent the issue of a fraud order as specified in the indictment as being a matter then "before" the

department and "pending" therein for decision—only such services fall within the charge in the indictment. The charge must be proved as laid. Evidence or proof of any other or different services (whether prohibited or innocent) is not only immaterial but incompetent.

See on this subject the opinion of MARSHALL, C. J., in Burr's Case, *ante*, p. 168–9.

This definition of the offense charged is essential to be borne in mind, because the course of the trial shows that it was overlooked by the district attorney and the learned Court below. No evidence was given of services to prevent the issue of a fraud order, but evidence was received of various visits by the defendant to the department which had not the slightest reference to the issue of a fraud order. Such evidence was not only received over the defendant's objection and exception, but what was worse and fatal to the defendant, the jury were charged that the services thus allowed to be proved, though not relating to the issue of a fraud order, and though they were not prohibited by Section 1782 of Revised Statutes, would, if the defendant received compensation therefor, make him guilty as charged in the indictment (Record, p. 249). This we proceed to show.

Communication from the Jury and Additional Charge of the Court.

The jury retired at eight o'clock Saturday evening, March 26, and came into Court Monday morning, March 28, and made to the Court a communication as follows (Record, page 246):

"A juror claims that as Senator Burton was employed by the Rialto Grain and Securities company as general counsel, such fact did not prohibit him from rendering such service before the Post Office Department. The juror's view, he states, is obtained from page 11, last paragraph, and page 12, of Judge ADAMS' instructions in third paragraph. Said jurors while be-

lieving that Senator Burton did at the instance of the Rialto Grain and Securities Company visit the Post Office Department at Washington and perform the services as shown by the evidence, yet as the report of the St. Louis Inspector showed that there was nothing in the complaint, the Senator was not guilty of any wrong doing."

The parts of Judge ADAMS' original instructions to the jury, referred to by the juror, are quoted by the Court (Record, page, 247, bottom, and 248), and they appear in the original charge (Record, pages 238–239). Such instructions are as follows (Record, page 238):

"As you have observed during the progress of the trial, one of the sharp issues of fact for you to determine in reaching a verdict on the several counts is: *whether the services rendered by the accused* for which he received compensation from the Rialto Grain and Securities Company, were rendered to that company, *before the Post Office Department*, or whether they were general professional services rendered that company, by way of advice, counsel, or otherwise, in other matters *not before the Post Office Department.*

"Notwithstanding the fact that the accused was a Senator of the United States he had the legal right, so far as this case is concerned, to practice his profession in any and all of its phases, and to receive compensation therefor in any way and manner, and on any terms as to compensation or otherwise deemed by him best, except that he could not receive compensation for services rendered before the Post Office Department, in any matter pending there in which the United States was interested as already explained."

These instructions are radically wrong in that they assume that the services rendered by the defendant in the five visits were of the character prohibited by Section 1782 of the Revised Statutes and alleged in the indictment, to wit: services to induce a favorable decision on the alleged pending question, to wit, the question of the issuance of a fraud order against the Rialto Company. In these instructions the Court did not submit to the jury the question whether any services were rendered by the defendant before the Post-Office

Department, nor did it submit to the jury the question whether those services, if any, were rendered, were services to induce a favorable decision on the question of the issuance of a fraud order; but the Court assumed both of these facts to exist and then left to the jury whether or not Burton received compensation for services rendered before the Post-Office Department.

Under the original instructions this juror clearly had in mind the fact that the report of the St. Louis Post-Office inspector on the Evans and Hout letters showed that there was nothing in the complaints in these letters to warrant action in the matter of the recommendation of a fraud order (Record, pp. 70, 202). This report, bear in mind, was made November 14, 1902, before ever Senator Burton was employed. These complaints of Hout and Evans were the only complaints which Senator Burton knew of at any time prior to his indictment (*Ante*, pp. 84–87, where this is fully shown). When these facts are borne in mind, and when it is borne in mind further that the matters on which Senator Burton made the five visits before the Post-Office Department did not at all concern the issuance of a fraud order, but related to other matters in which it was perfectly legal and proper for him to appear, it will be seen that what the juror claimed was perfectly correct, namely (page 246),

> " that as Senator Burton was employed by the Rialto
> " Grain & Securities Company as general counsel,
> " such fact did not prohibit him from rendering *such*
> " services before the Post-Office Department " ;

that is, *such services as the evidence showed he did render;* not services in respect of the issuance of any fraud order, for Burton did not even know that inquiry was pending (if any was pending) in regard to the issuance of a fraud order.

The view of this juror, therefore, stated in this communication, was that the complaint of Hout and Evans had been disposed of by the report of the St. Louis inspector on November 14, 1902, as shown in the testimony; and that Senator Burton had been advised of

this fact, as shown by the letter of Harlan to Senator Burton dated November 22, 1902, and that, therefore, Senator Burton did not even know that there was any question of the issuance of a fraud order pending before the Department, much less did he render any service in respect of any question of the issuance of a fraud order ; and thus the defendant was not guilty of any wrongdoing in rendering the services *which he did render* before the department in other matters in which it was perfectly proper for him to appear.

This, then, was the view presented by the communication of the juror. It was a sound and true view and went to the very heart of the case. This view, however, the Court negatives by these further instructions under which the jury were *compelled to find the defendant guilty if only they believed that he received compensation. The Court did not say that (1) if the jury believed from the evidence that services were rendered to prevent the issuance of a fraud order ;* and (2) if the jury believed that compensation was received therefor, that they should find the defendant guilty, but instead thereof the Court said (page 249) :

" I think this will make it clear, so far as the first part of the [juror's] inquiry is concerned, that in order to *excuse* the Senator from *anything* he did before the Department in rendering services, you must find he did not render *those* services for compensation, in accordance with the language of the charge, or that he did not receive compensation for *those* services. *If he received compensation for those services he is guilty under the law.*"

In other words, the Court in this charge included *everything* which Senator Burton did before the Department, *without excluding services which had no possible connection whatsoever with the issuance of a fraud order*, and said to the jury that " in order to excuse the Senator from *anything* he did before the Department in rendering services, you must find he did not render *those* services for compensation. If he received compensation for *those* services he is guilty under the law."

Again, the trial Judge said (page 249):

"He should go before the department, *if at all*, as a representative of the people, so that the relation between him and the office should be that of entire unreserve and fairness unaffected by the fact that he is receiving compensation for the services; so that he should be free, so that he should give information to the department which would subserve the interests of the government and the interests of all concerned, and not be bound by obligations which necessarily inhere from the fact that he is a paid attorney to receive compensation for doing it. In other words, as I said before, the gist of the complaint is rendering services for compensation, and therefore the bare fact that he should be employed and had the right to go before the Department to render services *does not excuse him provided he receives compensation for those services.*"

In other words, the Court here charged the jury that Senator Burton had not a right to go before the Department "*at all*," except "as a representative of the people" and without receiving any compensation.

Again the Court said in its charge (Record, page 248):

"He could go there and answer questions and make suggestions with regard to any matter that was pending there provided he did it in a free and independent way unaffected by the fact of receiving compensation."

Again the Court said (Record, page 248):

"Of course it is not meant that if Senator Burton was employed by the Rialto Grain and Securities Company as general counsel that that fact permitted him to render services before the department, for which he was to receive and did receive compensation. The gist of the offense charged in the case is rendering services there for compensation. That is the gist of it, rendering services for compensation. So that in answer to the first suggestion I will say it is undoubtedly an incorrect understanding of the law as well as of the plain meaning of the statements in the charge, to say that merely because the accused was employed as general counsel he had the right to render such services [that is, such services as he did render] before the Post Office Department."

This charge does not state that the defendant can be convicted only in case the jury believe that he rendered *services to prevent the issuance of a fraud order*, and does not exclude from the consideration of the jury services which the defendant rendered which were in no way connected with the issuance of a fraud order, and there is no statement whatsoever made in this charge distinguishing such services from services (alleged but not proved) in attempting to influence the Department in relation to the issuance of a fraud order.

This further charge was excepted to (Record, page 252).

Furthermore, the counsel for the defendant endeavored to have the Court state to the jury (Record, page 252) " that the requests to charge asked by the defendant, which were given by the Court, constitute as much a part " of the charge as any other parts. In view of the *generality* of the Court's charge as to the " services " the request of the defendant's counsel was not only proper, but necessary to protect the rights of the defendant and to prevent the jury from being misled by the further charge. But the Court refused counsel's request, and directed the jury to retire without giving any such instruction. This request and the ruling of the Court in this respect were as follows (page 252) :

" Mr. Krum : If the Court please, on the part of the defendant, I ask to have your Honor indicate to the jury that the requests to charge asked by the defendant, which were given by the court, constitute as much a part—

The Court : If you will wait a moment the jury may retire.

Mr. Krum : I beg your Honor to state to the jury—

The Court : Stop a moment and then I will hear your argument. I will after the jury retire hear counsel if they have anything to say, or any exceptions they may wish to take to the charge. The court here handed the Foreman of the jury the charge and instructions heretofore referred to and directed the jury to retire for further consideration of their verdict.

MR. LEHMAN: I do not believe that the requests to charge in the manner made by defendant and were given by the Court to the jury were given as they should have been, the suggestions being made by the court at the time that they were mere abstract statements which had the effect to deprive them of something of their force when they were not intended as mere abstractions and were believed by counsel to have specific reference to the case and those instructions, as well as others, ought to be called to the attention of the jury. We must except here as earnestly as it is in our power to do against the charge of the court made now.

THE COURT: If you except, I will allow the exception.

MR. KRUM: What I desired to do in the presence of the jury was to ask your Honor to indicate to the jury, as it was evident the jury did not understand, that it was a fact that the request to charge which were recognized by the court, acquiesced in by the court and given by the court, were just as much a part of your Honor's charge as that which the Court read as emanating from the court itself.

THE COURT: I did tell the jury so on Saturday.

[We respectfully submit that the Court did not tell the jury so on Saturday.]

MR. KRUM: I submit it is apparent they do not understand that they are just as much to be controlled by that part of the instructions as any other part. That is evident from the inquiry made.

THE COURT: The Court has endeavored to answer the only requests made by the jury, and that is all I think should be done.

MR. KRUM: We except to the last ruling of the court."

The instructions here referred to and requested by counsel for the defendant are found on pages 242, 243 of the Record, and are as follows:

"1. That whether the defendant can be adjudged guilty upon the indictment depends upon his having received compensation for a service rendered to the Rialto Grain and Securities Company in seeking to prevent the issue of a "fraud order" by the Postmaster General against the company. The service must have been rendered in the Post Office Department before some officer charged with the matter of inquiry; and must have been intended to induce such

officer to report favorably upon the matter before him, or to decide some question touching a proposed, or contemplated, "fraud order" favorably to the company. The offense consists in the rendition intentionally of the service indicated and the receipt of compensation knowingly for the service so intentionally rendered. It was the privilege of the defendant, as a Senator of the United States, to make inquiries in the Post Office Department of any of its officers in regard to complaints against the Rialto Company, and to make reports as to the same to the Company. The acts of the defendant in the Department must have been in the way of steps against the United States to prevent the issuance of a "fraud order," if one was contemplated, or to bring about a favorable result in an inquiry which might lead to such an order, if such an inquiry was on foot in the Department. If inquiries as to complaints were merely made, and no attempt made to influence any officer in the discharge of his duty, the defendant committed no violation of the statute, no matter what reports he made to his client, the Rialto Grain and Securities Company."

"2. Defendant had the right to engage, for compensation, as counsel in the case of the United States v. Dennis, and to do whatever was necessary and proper to be done in the conduct of the defense, including inquiry and investigation at the Postal Department respecting evidence which might exist there, favorable or adverse to Dennis, and no service rendered by the defendant in connection with the defense of the case against Dennis can be considered in support of the indictment."

"3. Any inquiries made, or services rendered, by the defendant in the Postal Department concerning the books of the Brooks Brokerage & Commission Company, and only concerning those books, are not to be considered as supporting any charge of the indictment."

"4. Defendant had the right to make inquiries at the Postal Department or of Postal officials as to the existence or non-existence of charges against the Rialto Grain and Securities Company, and the making of such inquiries, whether for his own information and guidance, or for the information and guidance of the company, will not support the indictment if there was no effort or purpose thereby to influence the action of any official of the Government."

"5. Before the defendant can be held guilty of the

charge against him it must be proven that he did something in connection with the investigation of the Rialto Grain and Securities Company by the Postal Department intended to influence the action of some official of that Department with respect to such investigation, and that defendant was paid and received compensation for so doing."

"6. As to any claims or demands made by individuals against the Rialto Grain and Securities Company the defendant had the right to act as counsel for the company, and as such counsel had the right to do whatever was necessary and proper to conserve the legal rights and interests of his client as to such claims or demands, and he had the right in that connection and for that purpose to make inquiry of any Department to ascertain the identity of such persons and whether they held the positions they claimed to hold."

While these instructions which were requested by the defendant were given by the Court at the end of the *original* charge to the jury, yet the Court in giving them destroyed their meaning and effect on the jury by a statement as follows (Record, p ge 242):

"These are abstract propositions of law, which I give in connection with the charge, as, perhaps, more fully amplifying it. I am willing to give them, inasmuch as they are asked and they contain general propositions of law."

With all respect to the learned trial Court these are not "*abstract*" propositions of law, but concrete and specific propositions applicable to the particular case and to the evidence before the Court. "*I am willing to give them*," *i. e.*, as a sort of matter of *grace* and not because the defendant had a *right* to have them given.

The giving by the Court of the further charge which it did give, after the jury returned on Monday, to the effect that Senator Burton had no right to go before the Department "*at all*" for compensation, and that "in order to *excuse* the Senator from *anything* he did before the Department in rendering services you must find he did not render *those* services for compen-

sation," and "if he received compensation for *those* services [that is, *anything* he did before the Department] he is guilty under the law," and the other instructions above quoted, given by the Court on its further charge, taken in connection with the fact that the Court utterly failed and expressly refused to state to the jury that Senator Burton could only be convicted for services rendered in connection with the question of the issuance of a fraud order, were clearly erroneous and could not but have misled the jury.

Note that the jury came back for further instructions to clear up a question about which one of the jurors was in doubt, and the court, instead of clearing up this matter, proceeded to give these further instructions, which were erroneous in the respects above pointed out. *From one end of these further instructions to the other there is no statement by the Court that the defendant should be convicted only in case the jury believed that he rendered services to prevent the issuance of a fraud order.* On the contrary, the Court, as above stated, instructed the jury that the defendant had no right to go before the Department "*at all*," except as a representative of the people, and without receiving any compensation, and that

"in order to *excuse* the Senator from *anything* he did before the Department in rendering services, you must find that he did not render *those* services for compensation, in accordance with the language of the charge, or that he did not receive compensation for *those* services. If he received compensation for *those* services, you must find him guilty under the law."

In other words, even if the Court in its original instructions on Saturday had properly given the law on this subject (which we deny) when it came to make this further charge to the jury on Monday, it stated the propositions of law and the duty of the jury incorrectly, and this further charge to the jury compelled the jury to find the defendant guilty if only the jury believed that he received compensation, although he may have performed no prohibited services, and al-

though none of the services performed had any relation to the issue of a fraud order and were not intended or designed to prevent the issue of such an order, and although the United States was not "interested" in any of the matters in relation to which the defendant performed services in the department.

That the trial Court not only mistook the inquiry of the juror, but that the trial Court erred in what it stated to the jury *as to the facts* as well as the law, is evident from the following. The Court further charged (Record, page 250, top):

"You can see plainly that the bare fact that service was rendered before the Department in the way charged in the indictment might be the very reason why there would have been in this case the report that there was nothing in the thing which was being investigated."

THE CHRONOLOGY of the matter is a complete refutation of this statement of the trial Court. The investigation made by the Post-office Inspector and the report made by him (Record, p. 70, p. 202) were made on November 14, 1902. Burton was not employed in this case, nor were any negotiations entered into for his employment until November 17, 1902, and the very earliest interview which Burton had in the Post-office Department was not until November 20, 1902. The "services" "charged in the indictment" were "*from November 22, 1902, to March 26, 1903.*"

The Court, therefore, was clearly in error when it undertook to say that any "service rendered before the Department [November 22, 1902, to March 26, 1903] might be the very reason why there would have been in this case the report [November 14, 1902] that there was nothing in the thing which was being investigated." This is not even a fallacy of *post hoc, ergo propter hoc*, but is a newly invented species of fallacy, which ought to be called *ante hoc, ergo propter hoc*. This erroneous

and mistaken statement of the Court, relating to the very matter which was in the juror's mind, was well calculated to mislead the jury and prejudice the defendant.

Prior to the defendant's employment, the only complaints (Hout and Evans) of which Burton had any knowledge had been disposed of, and that fact is referred to by the juror in his inquiry. The juror's inquiry related alone to the services, which the Court allowed to be proved against the defendant's objection, in the five visits to the department. These services are fully discussed under POINT II., and as is there shown, they had no relation whatever to a fraud order, but had relation wholly to other matters. This fact the juror knew, and his question therefore was that inasmuch as the pending complaint was disposed of before Burton was employed, and inasmuch as the services of Burton in the department had no relation to the issue of a fraud order in any matter pending there, the Senator was not guilty of any wrong doing in rendering services which had no relation to the issue of a fraud order.

The Court (Record, page 248) wholly mistook the inquiry of the juror. The juror had in mind the visits of the defendant to the department on matters not connected with the issue of a fraud order, all of which visits were lawful and constitute all the services of any kind or character which Senator Burton rendered before the department. But the Court in this additional charge assumes that those services, though in no way relating to the issue of a fraud order, were criminal. This false and fatal assumption on the part of the Court is demonstrated by the language on page 249, to wit:

"that in order to excuse the Senator from anything he did before the Department in rendering services, you must find that he did not render those services for compensation, in accordance with the language of the charge, or that he did not receive compensation for those services,"

that is, the services rendered in the five visits to the department. Then the Court adds the fatal sentence that forced the verdict from the jury, to wit: "*If he received compensation for those services he is guilty under the law.*"

That is to say, if the defendant made the mere inquiry on November 20, 1902, as to the existence of any complaints, or visited the department in connection with the Dennis indictment or sought to procure the books of the Brooks Brokerage Company, or made the inquiries as to the bogus inspectors, to wit, Bowman and Shove, these being the services of the defendant in the five visits before the department, as the testimony shows, then referring to such services and to the testimony, the court said that

"in order to excuse the Senator from anything he did before the Department in rendering services, you must find that he did not render those services for compensation. If he received compensation for those services he is guilty under the law."

In giving this direction the Court was not only wrong in the legal proposition, but plainly usurped the functions of the jury and violated the constitutional right of the defendant to have the facts of the case and question of guilty or not guilty of the charge laid in the indictment decided by the jury.

The indispensable elements of the offense charged in the indictment and to be proved by the Government, were these:

1st, that there was an inquiry pending in the department as to whether a fraud order should be issued against the Rialto Company;

2d, that the defendant rendered services in the department "with a view and for the purpose of inducing

the Postmaster-General to decide the inquiry so pending favorably to the Rialto Company;"

3d, that such services were rendered for compensation.

As we have shown above under POINT II., there was a total failure of proof to show that any services were rendered by the defendant for the purpose of preventing the issue of a fraud order, and, hence the Court ought to have granted the defendants motion at the close of the Government's case and his like motion at the close of the testimony, to direct a verdict for the defendant.

But supposing for the sake of the argument, that it be assumed that the defendant knew that there was such an inquiry pending in the Department (which the evidence completely negatives), and supposing further that there is anything in these five visits which could by any possibility have reference to the question of the issuance of a fraud order in the matter so pending, still the charge which we have above quoted is open to the fatal objection that it deprived the defendant of the right to have the jury pass upon the question of whether or not any of these services were intended to prevent the issue of a fraud order. For be it observed that the Court *says nothing about any fraud order or services in connection with the issue of a fraud order.* The Court refers and refers alone to the proof as to the services as shown in the five visits to the Department, and so referring uses this language (page 249):

"that in order to excuse the Senator from *anything* he did before the Department in rendering services, you must find that he did not render those services for compensation, in accordance with the language of the charge, or that he did not receive compensation for those services."

The court shifts the burden of proof from the prosecutor to the defendant. The court ought to have told the jury, if it submitted any question to them whatever, that "unless you find that the defendant ren-

dered services for compensation with a view to prevent the issue of a fraud order, he is not guilty; and the burden of proof is upon the government to show this." Instead of that, the court in the additional charge (page 249) fatally assumes that the services to the Department were not only actually rendered, but that they were of the kind prohibited by Section 1782 of the Revised Statutes, and then casts upon the defendant the onus of excusing himself for the rendering of those innocent and non-prohibited services; and the only way in which the court permitted him to "excuse" himself was by showing that he did not receive compensation. Practically the court said to the jury, "Senator Burton is guilty if he does not *excuse* himself in this particular way."

While the court in this put the burden on the defendant, it did not even permit him to escape being found guilty by showing that the services did not relate at all to the issuance of a fraud order. Even such an instruction would have been erroneous, as the burden is not on the defendant but on the prosecution. It prohibited the defendant from having the benefit of the defense that if these services were not rendered with a view and for the purpose of preventing the issuance of a fraud order, the defendant was not guilty. It also deprived him of the further defense that if at the time when he made these five visits to the Department he had no *knowledge* that a fraud order inquiry was pending, he would not be guilty under the law and the indictment; for this additional charge assumes that the defendant knew that there was such an inquiry pending and rendered the services with a view to procure a decision favorable to the Rialto Company, and this question was not submitted to the jury, but on the contrary the additional charge prevented the jury from considering this question.

Under this additional charge the jurors were not permitted to pass and did not pass upon the question whether the defendant rendered services for the purpose of preventing the issue of a fraud order. The

decision of this question the charge took away from the jury, and the Court decided it in favor of the prosecution. It left only to the jury the question whether the defendant received compensation for his services; for, we repeat, the Court's language is, "If he [the defendant] received compensation for those services, he is guilty under the law".

Proof that the defendant rendered services with a view and for the purpose of preventing the issue of a fraud order is fundamental. It is the very body and gravamen of the case. Now, in this case the proof showed beyond question that, during the time when the said alleged services were rendered by Burton, which are referred to in the Court's charge and additional charge, Burton *did not even know* that there was any question pending before the Department in respect of the issuance of a fraud order *(ante,* pp. 84–87), and hence any services rendered by him could not be, as it is alleged in the indictment, rendered with a view and for the purpose of preventing the issue of a fraud order. The question whether any services rendered by Burton was for the purposes laid in the indictment—to wit, to prevent a fraud order—was necessarily a question for the jury, and a vital error in this case is that this question was not submitted to or passed upon by the jury, but was taken from the jury by Court's charge and additional charge. The Sixth Amendment of the Constitution expressly provides:

"In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State or District wherein the crime shall have been committed, and to be informed of the nature and cause of the accusation," etc., etc.

The defendant was not only entitled to be brought into the presence of the jury and have the jury take some part in the trial, but he was entitled to have the jury pass upon the particular charge or accusation made in the indictment. The Sixth Amendment is satisfied with nothing less. The defendant was found

guilty without such particular charge being submitted to or passed upon by the jury; namely, whether or not the defendant rendered services before the Post Office Department for the purpose of preventing the issuance of a fraud order. On the contrary, the charge and especially the additional charge which brought about the verdict excluded from the jury any consideration of the offense laid in the indictment. And so there was, in fact, *no trial* at all by the jury of the defendant's guilt of such offense.

So that we insist that the question whether the defendant rendered services with a view and for the purpose of preventing the issue of a fraud order—has never been passed upon by the jury.

Under the constitutional guaranty of trial by jury, where the defendant pleads not guilty, the only constitutional tribunal that can pronounce the word "guilty" is the jury; and we insist with emphasis that the jury has never decided, and by this additional charge was not allowed to decide, whether the defendant rendered services for compensation with a view to prevent the issue of a fraud order, but were required under the pressure of the additional charge to find the defendant guilty if he rendered for compensation the lawful and proper services shown in the testimony in the five visits to the Department.

SIMILAR ERRORS IN ORIGINAL CHARGE AND INSTRUCTIONS.

The trial court also committed similar errors in its original charge to the jury (Record, page 230) as follows:

"To permit a Senator of the United States, whose influence, by reason of the high position he holds, is naturally persuasive and weighty with executive officers, to take compensation from persons for services rendered such persons before an executive department, would it was thought, create a duty in favor of such

persons arising from the implied obligation of fidelity to the client, from whom he should accept a fee, inconsistent with those relations of "ready confidence, and entire unreserve," which ought to exist between the legislative and executive departments of the Government in the promotion of the public weal, and in the enforcement of the laws of the land."

This charge, above quoted, utterly ignores the fact that the only prohibition in Section 1782 of the Statutes is against taking pay in any matter "in which the United States is a party or directly or indirectly interested." This charge assumes and states that the prohibition is general and absolute against taking compensation for *any* services rendered before an executive department.

This erroneous charge was read over and repeated by the Court in its additional instructions to the jury when they returned on Monday (Record, page 247).

Throughout the original charge to the jury the trial Court stated and gave the jury to understand that if the defendant rendered any services whatsoever before the department for pay, he violated Section 1782 of the Statutes. The Court does not in this charge make any statement—on the contrary, this charge negatives any statement—that the defendant might render services before the department and receive compensation therefor in matters in which the United States is not a party or directly or indirectly interested, and yet not be doing anything within the prohibition of the statutes.

The same thing appears again in the original charge to the jury (Record, page 238):

"As you have observed during the progress of the trial, one of the sharp issues of fact for you to determine in reaching a verdict on the several counts is whether the services rendered by the accused for which he received compensation from the Rialto Grain & Securities Company, were rendered to that Company before the Post-Office Department, or whether they were general professional services rendered that company, by way of advice, counsel or otherwise in other matters not before the Post-Office Department."

In short, the trial Court stated to the jury that if the services rendered "to the Rialto Grain & Securities Company were rendered to that Company *before the Post-Office Department*," then the defendant was guilty, but if they were "general professional services rendered that company by way of advice, counsel or otherwise in matters *not before the Post Office Department*," then he was not guilty.

The special objections to the original charge and additional charge are these:

1st. The charge and additional charge put a ban upon *all* services in the Department and ignored the fact that services may lawfully be rendered before the Department by a Senator for compensation if the United States is not a party or interested in the matter to which such services relate.

2nd. The charge and additional charge held that the services proved by the Government in the five visits, if they were rendered for compensation, violated Section 1782, although the United States had no interest (as the fact is) in the subject matter of such services, and although such services had no relation (as the fact is) to the only charge laid in the indictment—to wit, the rendering of services by the defendant with a view and for the purpose of preventing the issue of a fraud order.

Coerced Verdict.

THE TRIAL COURT ALSO ERRED IN COERCING THE JURY INTO RENDERING A VERDICT OF GUILTY.

The trial Court said, in its further instructions, after it had made some remarks in praise of the character and appearance of the jury (Record, page 250):

"Another trial of this case, which would have to follow in case of failure to agree, would simply require all these proceedings to be had before some other jury, and it is doubtful whether the case can be

presented as to all the facts connected with it that would give you more light, or any jury more light, than has already been given by the proceedings in this case. The trial of such a case is attended with great expense and great trouble to many witnesses and to the Department and to the Court, and another trial ought not to be required unless with faithful conscientious consideration of the facts under the law as laid down by the Court you should fail to reach a verdict."

Why, pray, was it not also said that the trial of such a case is attended with great expense and great trouble to the *defendant?* Is the defendant not entitled to any consideration in this matter, as well as the witnesses and the Department and the Court? This language of the Court is significant in connection with the other remarks and instructions of the Court which we proceed to consider.

The trial Court erred in the following instructions to the jury, when the jury came in for further instructions (Record, page 251):

"In order to relieve any member of the jury who might think otherwise, it is entirely proper to say that the law of the case as laid down by the court is subject always to review by an appellate court. If this court is wrong in its charge and instructions, there is opportunity of reviewing it in an appellate tribunal, so that whatever may be your views as to the court not being correct in the announcement of the law, you can always be assured if it is not correct in the matter that counsel for the defense in case of conviction will have full opportunity of submitting the matter to other tribunals to determine what is the true law upon the subject."

This instruction implies that the instructions of the Court *require a conviction;* else why did the Court say: "If this court is wrong in its charge and instructions, there is opportunity of reviewing it in an appellate tribunal" (the Government could not have a "review in an appellate tribunal"), and that "counsel *for the defense* in case of conviction will have full opportunity of submitting the matter to other tribunals." It is in effect a statement to the jury to go ahead and

convict the defendant, and then if the Court was wrong in its charge, the defendant might have the law reviewed in a higher tribunal. The jury so understood it and proceeded to convict the defendant. Language of this kind has been well commented on by the Supreme Court of Georgia in the case of *Hodges vs. The State*, 15 Ga., 117, in which that Court reversed the decision of the lower Court. In that case the Court said, LUMPKIN, J., giving the opinion (page 121):

"The Court charged the jury, amongst other things, that if he committed error, it could be carried to the Supreme Court and corrected, if against the prisoner; but not so if against the State.

"Again, we must condemn, as we have had occasion to do heretofore, this remark. If defendants have the advantage, as intimated by the Court, it is one to which they are entitled under the law; and it does not relieve either the Court or the Jury from the obligation to mete out to them, not only the full measure of their legal rights, but in cases of doubt, to give to prisoners the benefit of these doubts. To administer justice in mercy, less than this cannot be done."

In the present case the instruction above quoted is much more objectionable than that given in the Georgia case. The communication from the jury (Record, page 246) was:

"*A juror* claims that as Senator Burton was employed, etc., * * * the Senator was not guilty of any wrong doing."

In other words, that *one* juror was apparently in favor of the acquittal of Senator Burton. Thereafter the Court asked (Record, page 250):

"I would like to ask the foreman of the jury how you are divided. I do not want to know how many stand for conviction or how many for acquittal, but to know the number who stand one way and the number who stand another way. I would like the statement from the foreman."

"THE FOREMAN: Eleven to one."

"THE COURT: The jury stand eleven to one. *I gathered that from the communication.*"

In other words, the trial Court inferred from the communication of the jury that one juror was in favor of acquittal on the ground stated, and then the trial Court proceeds to give the instruction above quoted—namely, that "in order to relieve any member of the jury," that is, *in order to relieve this* ONE JUROR *who is in favor of acquittal*, the Court proceeds to say that if the Court has committed error the matter may be carried to an appellate court by the defendant. Under these circumstances, this amounts to a moral coercion of the juror to agree to a verdict of conviction, and the juror evidently understood that that was what the trial Court expected of him, and so agreed with the other jurors for a conviction.

The learned Court below quotes the opinion of the Supreme Court of the United States in the case of *United States vs. Allen* (Record, page 251), apparently under the mistaken supposition that what was said by this Court in the case of *United States vs. Allen* justified this coercion of the jury in agreeing to a verdict.

While a trial court in a criminal case may be allowed in a proper way to urge an agreement among the jury, as was permitted in the case of *United States vs. Allen*, yet the instructions of the Court in the present case went far beyond reasonably urging the jury to come if practicable to an agreement.

VIII.

For the foregoing reasons the judgment and sentence of the Court below should be wholly reversed.

JOHN F. DILLON,
HARRY HUBBARD,
JOHN M. DILLON,
W. H. ROSSINGTON,
FRED. W. LEHMANN,
For Plaintiff in Error.

APPENDIX.

CONSTITUTION OF THE UNITED STATES.

"ARTICLE III. SECTION 2. The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the State where the said crimes shall have been committed; but when not committed within any State, the trial shall be at such place or places as Congress may by law have directed."

Fifth Amendment to the Constitution.

"No person shall be held to answer for a capital or otherwise infamous crime unless on presentment or indictment of a grand jury, except in cases arising in the land or naval forces * * * nor be deprived of life, liberty or property without due process of law."

Sixth Amendment.

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

Privileges of Congress and Members.

The Constitution of the United States provides, as respects the privilege of Congress, *inter alia*, as follows:

"They [the Senators and Representatives] shall in *all cases* except treason, felony and breach of the peace, be privileged from arrest during their attendance at the session of their respective houses, and in going to and returning from the same."

Const., Art. I., Sec. 6.

STATUTORY PROVISIONS.

Revised Statutes United States.

"SECTION 731. When any offense against the United States is begun in one judicial circuit and completed in another, it shall be deemed to have been committed in either, and may be dealt with, inquired of, tried, determined, and punished in either district, in the same manner as if it had been actually and wholly committed therein."

Section 1782 is the one on which the indictment is founded, and is as follows:

"SECTION 1782. No Senator, Representative, or Delegate, after his election and during his continuance in office, and no head of a Department, or other officer or clerk in the employ of the Government, shall receive or agree to receive any compensation whatever, directly or indirectly, for any services rendered, or to be rendered, to any person, either by himself or another, in relation to any proceeding, contract, claim, controversy, charge, accusation, arrest, or other matter or thing in which the United States is a party, or directly or indirectly interested, before any Department, court-martial, Bureau, officer, or any civil, military, or naval commission whatever. Every person offending against this section shall be deemed guilty of a misdemeanor, and shall be imprisoned not more than two years, and fined not more than ten thousand dollars, and shall, moreover, by conviction therefor, be rendered forever thereafter incapable of holding any office of honor, trust or profit under the government of the United States."

Section 5480 of the R. S., referred to in the indictment, is as follows:

"SEC. 5480. If any person having devised or intending to devise any scheme or artifice to defraud, or to sell, dispose of, loan, exchange, alter, give away, or distribute, supply, or furnish, or procure for unlawful use any counterfeit or spurious coin, bank notes, paper money, or any obligation or security of the United States or of any State, Territory, municipality, company, corporation, or person, or anything represented

to be or intimated or held out to be such counterfeit or spurious articles, or any scheme or artifice to obtain money by or through correspondence, by what is commonly called the 'sawdust swindle,' or 'counterfeit money fraud,' or by dealing or pretending to deal in what is commonly called 'green articles,' 'green coin,' 'bills,' 'paper goods,' 'spurious Treasury notes,' 'United States goods,' 'green cigars,' or any other names or terms intended to be understood as relating to such counterfeit or spurious articles, to be effected by either opening or intending to open correspondence or communication with any person, whether resident within or outside the United States, by means of the Post-Office Establishment of the United States, or by inciting such other person or any person to open communication with the person so devising or intending, shall, in and for executing such scheme or artifice or attempting so to do, place or cause to be placed, any letter, packet, writing, circular, pamphlet, or advertisement in any post-office, branch post-office, or street or hotel letter-box of the United States, to be sent or delivered by the said post-office establishment, or shall take or receive any such therefrom, such person so misusing the post-office establishment shall, upon conviction, be punishable by a fine of not more than five hundred dollars and by imprisonment for not more than eighteen months, or by both such punishments, at the discretion of the court."

Sections 3929 and 4041 of the R. S., which confer authority upon the Postmaster-General in this behalf, are as follows:

"SEC. 3929. The Postmaster-General may, upon evidence satisfactory to him that any person or company is engaged in conducting any lottery, gift enterprise, or scheme for the distribution of money, or of any real or personal property by lot, chance or drawing og any kind, or that any person or company is conductinr any other scheme or device for obtaining money of property of any kind through the mails by means of false or fraudulent pretenses, representations or promises, instruct postmasters at any post-office at which registered letters arrive directed to any such person or company, or to the agent or representative of any such person or company, whether such agent or representative is acting as an individual or as a firm, bank, corporation or association of any kind, to return all such registered letters to the postmaster at the office at

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